(28,692)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 737.

U. S. WEBB, AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, AND C. C. COOLIDGE, AS DISTRICT ATTORNEY OF SANTA CLARA COUNTY, STATE OF CALIFORNIA, APPELLANTS,

vs.

J. J. O'BRIEN AND J. INOUYE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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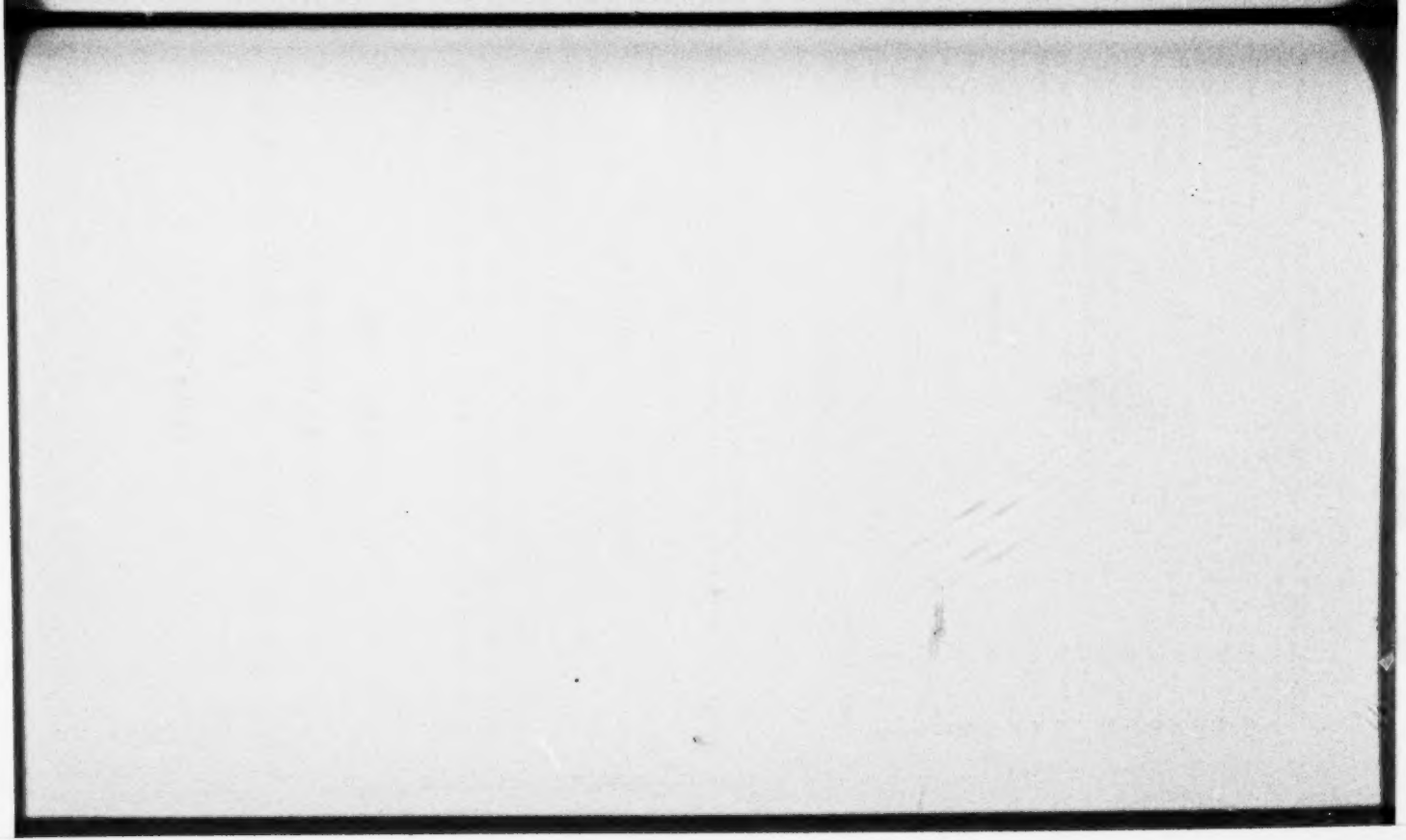

In the District Court of the United States in and for the Northern District of California, Southern Division.

No. 654.

J. J. O'BRIEN and J. INOUYE, Plaintiffs,

vs.

. S. WEBB, as Attorney General of the State of California, and C. C. Coolidge, as District Attorney of Santa Clara County, State of California, Defendants in Equity.

Bill of Complaint.

o the Honorable Judges of the District Court of the United States, Northern District of California, sitting in equity:

J. J. O'Brien, a citizen of the United States and of the State of Cali-rnia and a resident of the said Northern District of California, outhern Division, and J. Inouye a subject of the Emperor of Japan, id a resident of the said Northern District of California, Southern ivision, bring their Bill of Complaint against U. S. Webb, as At-rney General of the State of California and C. C. Coolidge as Dis-ict Attorney of the County of Santa Clara, State of California, and ow unto your Honors as follows:

I.

That plaintiffs sueing on behalf of themselves and others similarly uated bring this Bill of Complaint against said U. S. Webb as the ly elected, qualified and acting Attorney General of the State of lifornia, and against C. C. Coolidge the duly elected, qualified and ting District Attorney of the County of Santa Clara in the State California.

II.

That the value of the matter in dispute herein between each plain-f and the defendants is in excess of the sum of Three Thousand 3,000.00) Dollars exclusive of interest and costs.

III.

That this suit is a suit in equity and arises under the Constitution id Laws of the United States as will hereafter more particularly ap-ar. Among other things this suit is brought to repress and pre-nt the deprivation under color of a certain statute of the State of lifornia and of certain rights and immunities secured to the com-ainants by the Constitution of the United States, that is, a right to ve and enjoy their property without being deprived thereof with-

out due process of law and without being denied the equal protection of the law, and this suit, among other things, involves the question as to whether or not a certain cropping agreement which complainants propose to execute is contrary to the said statute of the State of California and whether or not the said statute if it prevents the execution of said cropping contract is not contrary to the Constitution of the United States and whether or not the defendants in threatening to enforce the provisions of said statute against complainants are not depriving the complainant J. Inouye of his right freely to earn a liv-lihood.

This suit is brought to repress and prevent the defendants from proceeding under and by virtue of the provisions of the statutes of California, hereinafter referred to, from illegally and unlawfully threatening complainants with arrest and imprisonment under the color of said statute.

IV.

That the plaintiff J. J. O'Brien is now and for a number of years last past has been the owner of the following described real property situated lying and being in the County of Santa Clara, State
3 of California and more particularly described as

The South Half (S. ½) of Lot Number Seven (7) in the Coleman Younger Tract as per map on file in the County Recorder's Office of said Santa Clara County, amounting to about Ten (10) acres.

V.

That the said real property is agricultural in character and is particularly adapted to the raising of Strawberries, Loganberries, Raspberries, and vegetables, and for a number of years has been and now is being devoted to that and kindred agricultural purpose-.

That the plaintiff J. Inouye is a capable farmer and is in all respects a desireable and competent person to farm said real property and to enter into a cropping contract for the growing of crops upon said property.

That the plaintiff J. J. O'Brien wishes to execute a cropping contract with the plaintiff J. Inouye for a period of Four (4) years and the plaintiff J. Inouye wishes to execute such a contract with the plaintiff J. J. O'Brien and both of said parties wish to enter into a cropping contract substantially in the form of the contract hereto annexed, marked "Exhibit A," referred to herein and made a part hereof.

That except for the threats and acts of the defendants hereinafter referred to the plaintiffs would execute said cropping contract, exhibit A, and that the plaintiff J. Inouye wishes to enter into the employ of the plaintiff J. J. O'Brien in accordance with the terms as set forth in said Exhibit A and the execution of said contract is necessary, as plaintiffs allege and believe, in order that the above described land may be farmed to the best advantage and in order that the plaintiff J. J. O'Brien may secure the largest return therefrom

and in order that the plaintiff J. Inouye may receive compen-
4 sation therefrom and that if the said plaintiffs are prevented from entering into said contract Exhibit A or any cropping contract substantially in the form of Exhibit A, the said plaintiff J. Inouye will thereby be deprived of his right to earn a living in the business for which he is best fitted and which he understands or he will be seriously embar-assed in his efforts to earn such a living for himself.

That if the said plaintiff J. J. O'Brien is prevented from entering into the said contract, Exhibit A, or a cropping contract in substantially the same form, *which* plaintiff J. Inouye the said plaintiff J. J. O'Brien will be seriously obstructed and interferred with to his great damage in the management and control of his property.

That both said plaintiffs are law-abiding and wish to conform in every way to all proper laws but that in view of the threats of the defendant U. S. Webb, as Attorney General of the State of California the plaintiffs fear to enter into the contract Exhibit A and plaintiffs will be prevented from entering into said contract unless they are protected from the threats and acts of the defendants under and in pursuance of the Statute of California hereinafter referred to, and under color of which defendants are making said threats.

VI.

That there was enacted by the electors of the State of California at the general election, November 2nd, 1920, an Act entitled

An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, pre-
5 scribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith.

(Submitted by the initiative and approved by electors November 2, 1920. In effect December 9, 1920.)

VII.

That the defendant U. S. Webb, as the Attorney General of the State of California, and the defendant C. C. Coolidge, as District Attorney of the County of Santa Clara have threatened to, and will enforce said Act in each and all of its terms, and the whole thereof, and particularly against these plaintiffs in the event that they execute the cropping contract for the purposes and upon the terms substantially as set forth in Exhibit A and will forfeit or attempt to forfeit the said real property by escheat proceedings to the State of California, and will prosecute these plaintiffs criminally for an alleged violation of said Act above mentioned if they enter into any cropping contract in the form substantially as set forth in Exhibit A.

That the said Act is in its terms so drastic, and the penalties attached to the violation of the terms thereof are so great that neither of these plaintiffs may make or execute such cropping contract, Exhibit A, even for the purpose of testing the constitutionality and validity of the said Act above mentioned or the application of said Act to such a contract as the said Exhibit A and unless this Court shall determine the validity of this Act in this proceeding and the application of said Act to said proposed contract, Exhibit A, said plaintiffs will be compelled to submit to said Act, whether the same be valid or invalid and will be compelled to submit to the defendants' interpretation of said Act and the threats of the defendant U. S. Webb as Attorney General in connection therewith, and will thereby be deprived of their property without due process of law and will be denied the equal protection of the law in contravention of the
6 Fourteenth Amendment to the Constitution of the United States, and the plaintiffs have no adequate remedy at law and are relievable only in a court of equity.

That the said defendant U. S. Webb, as the Attorney General of the State of California has written various letters which have been published in the newspapers of the State of California, threatening prosecution of all persons who enter into any cropping contract involving agricultural lands substantially similar to the contract herein referred to Exhibit A and has instructed all the District Attorneys of the various counties of the State to proceed with the prosecution of all persons entering into cropping contracts with aliens ineligible to citizenship and that as a result of the public threats of the said defendant U. S. Webb plaintiffs as hereinbefore alleged are prevented from entering into any cropping contract substantially like Exhibit A until their right to enter into such contract shall have been determined by this Court.

VIII.

That the said Act is in contravention of Section I of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiffs of property without due process of law and denies to them and each of them the equal protection of the law; and protection of said Section I of the Fourteenth Amendment to the Constitution of the United States is hereby specially invoked by the plaintiffs and each of them.

IX.

That if plaintiffs are not permitted to execute a Cropping Contract involving the said real property as afore-d and on substantially the terms above mentioned a large and irreparable loss will occur to them and each of them and the plaintiffs have no adequate remedy at law but are relievable only in a Court of Equity and that the loss to each of said plaintiffs would be in excess of Three Thou-
7 sand ($3,000.00) Dollars, exclusive of interest and costs.

X.

In as much as plaintiffs and each of them have no adequate remedy in the premises by the strict rule of law and can obtain relief only in a court of equity where matters and things of the kind and character hereinbefore state- are perfectly cognizable and relieveable, and to the end that they and each of them may have relief which they and each of them can only obtain in a court of equity, they and each of them pray:

1. That U. S. Webb, as Attorney General of the State of California and C. C. Coolidge as District Attorney for the County of Santa Clara, California, be enjoined and restrained, provisionally, preliminarily and perpetually by the order and injunction of this Court from bringing, directly or indirectly, and from permitting to be brought directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said Act of the Legislature of the State of California above mentioned against these plaintiffs, or either of them, upon their executing or attempting to execute a cropping contract substantially as above set forth and substantially for the above mentioned term, or any other person, similarly situated, and from causing the plaintiffs, or either of them, or any other person similarly situated, to be arrested for violating the terms and provisions of said Act, and from taking any other action in any other manner to prevent or interfere with the complainants, or either of them from executing and delivering such contract on such real estate, and that an order to show cause issue herein upon application of the plaintiffs herein directed to the above named defendants, requiring them to show cause why a temporary injunction should not issue as prayed for herein, and that a temporary restraining order may issue pending the hearing of said show cause order.

2. That upon the hearing the aforesaid Act of the State of California be declared to be unconstitutional, illegal and void
6 and that a perpetual injunction be issued restraining the enforcement thereof as hereinabove prayed for.

3. That a writ of subpœna may issue to defendants requiring them to answer this bill of complaint fully and truthfully, but not on oath, an oath being hereby waived, and that further and general relief be granted as the nature of plaintiffs' case may require or to equity may seem meet.

ALBERT H. ELLIOT AND
GUY C. CALDEN,
Solicitors for Complainants.

THE UNITED STATES OF AMERICA,
Northern District of California,
Southern Division, ss:

J. J. O'Brien and J. Inouye, each being first duly sworn, on oath deposes and says for himself: I am one of the plaintiffs named in the foregoing Bill of Complaint; I have heard read the foregoing

Bill of Complaint, know the contents thereof, and the same is true of my own knowledge; that I make this verification in behalf of my co-plaintiff as well as in my own behalf.

J. J. O'BRIEN.
J. INOUYE.

Subscribed and sworn to before me this 13th day of October, 1921.

[SEAL.] HENRIETTA HARPER,
Notary Public in and for the State of California,
City and County of San Francisco.

9 "EXHIBIT A."

Cropping Contract.

Parties to Contract.

This agreement made this 7th day of October, 1921, between J. J. O'Brien, hereinafter called Owner, and J. Inouye hereinafter called Cropper.

Whereas: Owner is the owner of a certain tract of land situated in the County of Santa Clara, State of California, and more particularly described as follows, to-wit:

Description of Property.

South Lot Number Seven (7) in the Coleman Younger Tract as per map on file in the Recorder's Office, amounting to about ten (10) acres.
and

Terms and Objects of Contract.

Whereas: Owner wishes to employ Cropper for a period of Four (4) years, being from the First day of December, 1921, to the First day of December, 1925, as an employee for the purpose of planting, cultivating and harvesting crops to be grown on Owner's land above described, under the following terms and conditions:
Owner agrees

No Interference by Owner.

A. To employ Cropper and not to interfere with him in the planting, cultivating and harvesting of the crop in any way, and to protect Cropper during the existence of this contract against interference by any person whatsoever, the general possession of the land above described being reserved to Owner.

10 Housing of Cropper.

B. To provide and maintain housing accommodations for Cropper:

Owner Furnishes Tools, etc.

C. To furnish all necessary tools, farming implements, tractors and the oil and gasoline for the operation thereof, horses and horse feed for the planting, cultivating and harvesting of the crop or crops herein provided for, during the term hereof, and to furnish any and all things necessary for the proper farming of the land herein described for the purposes herein set forth:

Owner Hauls Crop to Delivery Point.

D. To haul the said crop when properly prepared by Cropper for hauling and shipping, to the packing house or nearby station.

Cropper no Interest in Land.

E. To permit the Cropper to work the land upon the conditions herein set forth, provided that the Cropper shall have no interest or estate whatsoever in the land described herein.

Cropper's Compensation to be a Percentage of Crop Grown.

F. To give to Cropper fifty (50%) percent of all crops grown on the above described land during the period of this Agreement, as compensation for the services and labor of the Cropper, as herein set forth.

The Cropper's Right to Remove Share of Crop from the Land.

G. To grant to the Cropper his right to a division of the crop after it is harvested and before its removal from the land, provided that the Cropper exercises his option thereunto, and in the event of the exercise of such option, to grant to Cropper the right to remove from the land his share of the crops within a reasonable time, even though said time should extend beyond the term of Cropper's employment as herein provided for.

11 Cropper's Right to Employ Others with Right of Ingress and Egress.

H. To grant to the Cropper the right to carry out the terms of this Agreement by employing such agents or employees as he shall see fit, and to give to such agents or employees free ingress or egress from said property, or the right to live thereon, without let or hindrance.

Cropper agrees:

Specification of Crops to be Grown.

I. After the execution and delivery of this Agreement, and at the proper time to plant, cultivate, and harvest the following specified crops: Strawberries, Raspberries, Loganberries and Vegetables in a good and farmerlike manner.

Cropper to Maintain Personal Property and Return Same.

J. To maintain and keep up the personal property and to return to Owner at the termination of this Agreement, all farming tools, implements, tractors, horses and all other personal property of every kind and character, the use of which is herein granted, in as good condition as they were when delivered to Cropper, reasonable wear and tear thereof excepted.

Irrigation Ditches to be Maintained.

K. To keep the banks and bottoms of irrigation ditches on, adjacent to, and tributary to said land, free from weeds and foul growths; to repair and maintain all levees; to prevent losses of irrigation water, and in particular to prevent the overflow thereof into driveways and roads and to guard against fires of all kinds.

Harvesting and Preparation of Crops for Shipment.

L. To harvest all corps when ripe, to pack the same in accordance with best standards, to prepare the same for shipping or transportation if necessary.

12 Owner's Right to Terminate Contract on Sale of Land and Payment to be Made Cropper in That Event.

It is mutually understood and agreed by the parties hereto that in case of the land being sold, during the term of this Agreement, the Owner shall have the option to terminate this Agreement by paying to Cropper for his own services at the rate of $100.00 per month from the beginning of the calendar year in which this Agreement is to be terminated, together with all money expended or incurred by said Cropper for and on account of labor and materials furnished for the planting and cultivation of the crop or crops then growing on the land, with interest at the rate of seven (7%) per cent per annum, or allow Cropper to harvest the crop or crops then growing thereon.

Damages to be Paid by Owner to Cropper on Breach of Contract by Owner.

It is further mutually understood and agreed by the parties hereto that in case of any breach of this contract on the part of Owner or in case of any hindrance with or prevention of farming upon said or

any part of said land, Owner agrees to pay to Cropper, within thirty days from the date of such breach, all moneys expended or incurred by Cropper for the planting and cultivation of the then growing crop or crops, and in addition thereto a sum equivalent to twenty per cent of such total amount so expended or incurred by Cropper, as his liquidated damages for the cancellation of this Agreement, provided, however, that Cropper, at the date of such breach, shall have fully kept and performed all the covenants by him to be performed under this Agreement.

In witness whereof, the parties to this Agreement have hereunto set their hands and seals the day and year first above written.

—— ——, [SEAL.]
Owner.
—— ——, [SEAL.]
Cropper.

13 Endorsed: Filed Oct. 13, 1921. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.

14 (Title of Court and Cause.)

Affidavit of J. J. O'Brien on Application for Interlocutory Injunction under Section 266, Judicial Code.

CITY AND COUNTY OF SAN FRANCISCO,
State of California, ss:

J. J. O'Brien, being first duly sworn deposes and says: That he is one of the plaintiffs named in the above entitled action and that he is the owner of the property described in the Complaint on file in said action; that he wishes to enter into the crop agreement, Exhibit A, attached to the Complaint in said action and would execute said crop agreement in good faith were it not for the fact that he is afraid he will be prosecuted by U. S. Webb, Attorney General of the State of California under the statute referred to in the complaint in said action; that affiant has joined with J. Inouye bringing said action in good faith in order to determine his right to enter into the said crop agreement, Exhibit A, without the fear that he may be prosecuted criminally and subjected to great trouble, annoyance and expense in connection therewith and also that he may not be subjected to a civil action by the said Attorney General, brought for the purpose of escheating the said real property under the terms of said Act; that affiant has been advised by his attorney that the said crop agreement does not in any way offend against the said Act and that if the said crop agreement, Exhibit A, is included within the prohibitions of said Act, that the said Act is by reason thereof unconstitutional and void; that affiant fears that the said Attorney General and the District Attorney of Santa Clara County may prosecute affiant if he should enter into said contract,
15 Exhibit A, because of the following facts and circumstances:

That on July First the said Attorney General wrote a letter which was published in the newspapers of the State and which was made the subject of a pamphlet issued and spread broadcast throughout the State, which letter was in words and figures as follows:

"State of California,

Office of Attorney General.

San Francisco, July —, 1921.

Hon. Hugh B. Bradford,
District Attorney, Sacramento County,
Sacramento, California.

DEAR SIR:

The efforts of aliens ineligible to citizenship to acquire land in this state in violation or evasion of the alien land laws of 1913 and 1920 are in various forms continuing, and to successfully meet these efforts there is required the most intelligent and vigilant action by all officers in any manner charged with duties in the enforcement of these laws.

In some instances the violation or evasion is attempted by having the title to the land conveyed to a native born minor citizen or to a trustee, the consideration being furnished by the alien and the profits or product from the land being taken thereafter by such alien.

Where the effort is not to acquire title but to secure the beneficial use of the land, various forms of contracts are resorted to, such as an agreement that the ineligible alien shall occupy, possess and farm the land and receive a share of the product.

In the majority of instances these transactions involve the participation of one or more American citizens, fully advised
16 in reference to these laws and of necessity well knowing that the indirect method of dealing is adopted for the purpose of avoiding them, and not infrequently their action constitutes a direct violation of the penal provisions of the Alien Land Act of 1920.

The law expressly prohibits the appointment of an alien ineligible to citizenship as guardian of the estate of a minor in those instances where such estate consists of property which such alien could not lawfully own or acquire. Prior to the Alien Land Law of 1920, there were numerous instances in which alien Japanese had been appointed guardian of the estate of minors, such estate consisting of property which the alien could not own or acquire. In many instances the reports and accounting required by law have not been made. Such failure on the part of the guardian is ground for removal, and it is also ground for removal that facts exist which would have rendered such alien ineligible for appointment in the first instance, and these guardianship matters should be given your attention.

The act of 1920 makes it your duty, as well as that of the Attor-

ney General, to commence the proper proceedings to have an escheat adjudged whenever requisite evidence therefor is obtained.

With the view of supplementing these laws and providing further means for their enforcement a new section, numbered 931, was added to the Penal Code by the last legislature, approved by the Governor, and will become effective on July 28, 1921, which directs that the grand jury of the county shall investigate any transaction appearing to be in violation or avoidance of the Alien Land Law, and your assistance should, of course, be fully given to the grand jury in such investigations.

17 The administration of the penal provisions of the Alien Land Laws rests largely with the local officers, to whom the evidence of violations is most accessible, and who are empowered by law to secure such assistance as may be required and to incur such expense as may be necessary in the performance of the duties of enforcement.

The colonization in many parts of this state by ineligible aliens, and particularly by alien Japanese, is so well known as to make its statement unnecessary and I know that you will agree with me that every effort should be made to secure the strict enforcement of these laws.

Your attention is especially called to the fact that the penal provisions of these laws apply alike to all persons, citizens as well as aliens, and I urge you, and through you the grand jury and other local officers, to make the most vigorous efforts to secure for this state the objects which these laws seek to attain.

In order to insure the fullest co-operation I am addressing this letter to each District Attorney in the state.

Very truly yours,

U. S. WEBB,
Attorney General."

That in reply to said letter the said Hugh E. Bradford District Attorney of Sacramento County, wrote on July 9th., 1921 a letter to the said Attorney General, which letter was also published in the pamphlet to which reference has herein been made and from which letter affiant quotes as follows:

"I concur in your view that vigilant action should be taken by all officers charged with the duty of enforcing these laws and you may rest assured that I will cheerfully do whatever I can,

18 either independently or in co-operation with you, in the matter of the enforcement of the same."

That the Stockton Chamber of Commerce wrote to the said Attorney General for an opinion of the legality of several propositions which might be considered contracts between Japanese laborers and land owners and in reply to said letter the Attorney General wrote a letter which was published largely in the newspapers and from which affiant quotes as follows:

"* * * 'The broad and beneficient purpose of the law,' as interpreted by the attorney general, 'is to prevent the occupancy, dominion and beneficial use of agricultural lands by aliens who cannot become citizens of the United States, and to reserve such lands for the possession and enjoyment and beneficial use of American citizens, or aliens who can become such.' "

"Stockton Chamber of Commerce, Stockton, Calif. Gentlemen: 'I have yours of the 17th inst., as follows:

" 'We are requested by a member of this organization who has extensive holdings in the delta of San Joaquin river, to ask you if it will be lawful for him to enter into a contract or contracts with Japanese labor upon terms and conditions following, namely:

" 'Proposition 1.—Owner of land agrees, in the growing of onions, to supply seed, hoes and tools, and sacks, and pay $1.50 per hundred of crop f. o. b. ranch headquarters as compensation for planting and care of crop, and harvesting of same.

" 'Proposition 2.—Owner of land agrees in the growing of sugar beets, to supply seed, tools and sacks, and pay $5.00 a ton of crop f. o. b. ranch headquarters as compensation for planting and care of crop and harvesting of same.

19 " 'Proposition 3.—For cultivation, hoeing, harvesting and washing of asparagus, owner of land agrees to pay 1½ cents a pound for labor performed.

" 'Contracts on the above proposition to run for a term of one year or ten years.

" 'The party for whom this inquiry is made realizes that these questions might be propounded to an attorney, but in his anxiety to be certain in his course of action, and not to violate the law, desires to have interpretation of the so-called anti-leasing law from your office as particularly applied to the propositions above set forth.

" 'Your attentive consideration to this request will be appreciated.

" 'Replying thereto, I quite realize as suggested by you that the party in behalf of whom you write might well be guided by the advice of his own, yet in a question that so greatly concerns the people of the state, and indeed the country generally, for such aid as it may be I am quite willing to express my views thereon.

" 'Prior to the adoption of the alien land law in 1913, aliens ineligible to citizenship could legally purchase or lease agricultural lands. Where it was not sought to acquire the title, the custom of leasing was very common and the increasing acreage of farming lands passing into the possession and control of alien Japanese became so alarming that the legislature adopted in 1913 the so-called alien land act.

" 'I drafted this act, but the original act did not authorize leasing of agricultural lands, and upon the representation of certain land owners that the prohibition of leases at that time would work a grave injury to such owners, and that if a reasonable time be
20 provided for, such owners would be able to adjust themselves to the new conditions and avoid the threatened losses. The

legislature yielding to these representations changed the original draft by adding the provision permitting leases for a term of three years. Under the operation of this leasing clause the acreage passing to the control of Japanese rapidly increased, and by vote of the people the leasing provision was eliminated at the election in 1920.

"'It was not the thought of the people that this amendment would merely make illegal the contract technically called a "lease," but the purpose was to make it unlawful for such aliens to have possession, enjoyment and beneficial use of agricultural lands. Since the adoption of that amendment the ingenuity of various citizens has been employed in effects to devise methods by which the objects and purposes of the act could be defeated. * * *

"'The propositions stated in your letter evidence a plan whereby ineligible aliens may be given the possession, enjoyment and beneficial use of agricultural lands as completely as though this were accomplished through the direct payment of rental, whether such payment be made in cash or by a portion of the crop. It would seem that an alien placed in possession of lands under such an agreement would have such rights in the land as given by the usual form of lease. Such arrangements seek to accomplish what the statute prohibits without incurring its penalties.

"'The broad and beneficient purpose of these statutes is to prevent the occupancy, dominion, and beneficial use of agricultural lands by aliens who cannot become citizens of the United States and to reserve such lands for the possession and enjoyment and beneficial use of American citizens, or aliens who can become such. * * *

"'I think the agreements suggested in your three propositions are prohibited by the terms of the alien land act and are wholly
21 antagonistic to the spirit and purpose actuating the electorate of this state in adopting it.

Very truly yours,

U. S. WEBB,
Attorney-General.'"

That the said Attorney General issued a letter to all of the District Attorneys of the State of California portions of which letter were published in many of the newspapers in the State in which letter the Attorney General says:

"Where the effort is not to acquire title but to secure the beneficial use of the land, various forms of contracts are resorted to, such as an agreement that the ineligible alien shall occupy, possess and farm the land and receive a share of the product.

In the majority of instances these transactions involve the participation of one or more American citizens, fully advised in reference to these laws and of necessity well knowing that the indirect method of dealing is adopted for the purpose of avoiding them, and not infrequently their action constitutes a direct violation of the penal provisions of the Alien Land Act of 1920."

That on December 23rd, 1920 the said Attorney General wrote a letter to Irvine P. Aten, attorney at law, Fresno, which letter is as follows:

"San Francisco, December 23, 1920.

Irvine P. Aten, Esq.,
Attorney at law,
Fresno, California.

DEAR SIR:

I have your letter of December 21, 1920, in which you submit two questions, as follows:

'1. Can a farmer make a contract with a Japanese alien to do the annual work on the farm necessary for the producing and curing of a crop, and pay him, as his compensation therefor, any percentage of the crop so produced and cured, or any percentage of the proceeds received from said crop?

22 '2. Can a farmer employ a Japanese alien to do work on any of his lands and pay him in return all of the proceeds or any portion of the proceeds derived from the sale of an inter crop, that is, a crop planted between rows of trees or vines?'

Under section 2 of the Alien Land Law, aliens ineligible to citizenship may not acquire, possess, or enjoy real estate, other than in accordance with the treaty existing between this government and the government of which such alien is a citizen or subject.

In my judgment, there is nothing in the treaty existing between the government of the United States and the empire of Japan which authorizes or sanctions the character of arrangement indicated in the two questions quoted.

These arrangements have all the appearance of accomplishing the purpose of a lease in an indirect rather than a direct way Such a contract would of necessity give to the alien the possession and enjoyment of the real estate in direct violation of the terms of the statute.

After the adoption of the act of 1913, many methods were devised in an effort *fo* avoid the prohibition against ownership. Many of these methods were mere subterfuges, fraudulent in conception and purpose, and could be defended only by perjury.

It is to be hoped that similar efforts will not be made against this statute as it now stands, which prohibits leasing.

Very truly yours,

U. S. WEBB,
Attorney General."

On July 8th, 1921 the said Attorney General wrote a letter to R. B. Whitelaw, Attorney at Law, El Centro, the substance of
23 which letter was published in the newspapers of the State and part of which letter is as follows:

"* * * It is stipulated that the party of the second part 'is an experienced agriculturist and farmer.'

Paragraph (1) of the so-called agreement purports to 'hire and employ' the ineligible alien as the 'manager and sole agent for the care and management' of the lands for a specified term of years, for the 'purpose of planting, cultivating and harvesting the crops to be grown on said premises', and the owner agrees that the ineligible alien shall have 'the exclusive right to work' the property during the term, 'with the right of free ingress, egress, regress and occupancy' for himself, his agents, or employees.

By paragraph (*a*) the ineligible alien promises that 'he will use and work said premises at the proper time at his own expense, plant, cultivate and harvest thereon the following specified crops', and that he will do all of this 'in a good and farmerlike manner, and according to the usual course of farming practiced in the neighborhood.' He agrees also that he will not commit waste or suffer damage to be committed upon the premises, that he will keep the same in good repair and that he will "at his own expense furnish all seed or seeds, plant or plants, necessary to be sown or planted on the premises." That he will also do or cause to be done at 'his own expense all necessary work and furnish all implements therefor,' and that he will 'harvest all crops when ripe,' and that he will 'at his own expense' pursuant to the best standards 'prepare the same for shipment or transportation.'

Paragraph (3) obligates the party of the first part to pay the ineligible alien 'for and in consideration of the services hereinbefore referred to' and 'on account of' money 'advanced' by the alien 'in and about the planting, cultivation and harvesting of crops' then
24 follows the amount to be paid, namely, 'an undivided one — of all the crops grown' on the premises during the term. Then follows the provision for the division of the crops, for the removal of the respective shares of the same, for notice to the owner when the crops are ready to be divided, and the further provision that the party of the second part shall not be deemed 'to have any interest or estate whatsoever in the premises.'

Paragraph (4) gives to the party of the first part the option to terminate the lease upon the payment for services performed and money expended.

Paragraph (5) provides against disturbances by the owner of the 'quiet enjoyment' of the premises by the ineligible alien.

While paragraph (6) provides for the submission of certain differences to arbitrators to be selected as therein provided.

Accompanying this agreement is a so-called memorandum, in which the agreement is referred to and by which the party of the first part agrees to sell to the party of the second part all of the interest of the party of the first part 'in and to all crop or crops of — grown or to be grown during the harvesting season of —, upon' the premises.

I have thus called particular attention to the more important provisions of this agreement and the memorandum accompanying the same.

It will be remembered under the facts as I have herein assumed

them to be, the party of the second part, the ineligible alien, may not legally acquire, possess, enjoy or lease agricultural lands, and that the right to lease agricultural lands existed until the amendment of the Alien Land Act of 1913 by the initiative measure in 1920,
25 and that the practice of leasing such lands to such aliens had become quite common.

This agreement, it is true, is not in the form of a lease, yet it gives to the party of the second part, the ineligible alien, all that a lease commonly gives, and reserves. It is framed to accomplish the purposes of a lease, and evidently the common form of lease would have been used but for the prohibitions of the law. Though notwithstanding the law, it is sought to accomplish through this character of instrument that which the framers of this instrument know the law intends to prevent. It is sought by this instrument to place an ineligible alien in the possession and enjoyment of agricultural lands, with the full right to farm the same, and to receive a share of the product. In short it gives to the ineligible alien the beneficial use of agricultural lands as fully as could be given to him by any character of lease that could be framed.

More need not be said, enough has been said to show that the instrument is designed to avoid and evade the statutes of this state, to accomplish indirectly what the statute directly prohibits. Furthermore the instrument shows that its drafting is not the effect of the ignorant, but it is the effort of the informed, it is the effort of the person who knows the law and who designedly and willfully contrives to devise a method by which the purpose of the law can be defeated. * * *

It is my view that this instrument is designed to accomplish an unlawful purpose, is a subterfuge knowingly prepared to aid in the law's violation. It is to be regretted that alien residents of this state who are ineligible to citizenship persist in efforts to violate our Alien Land Laws, but more culpable are citizens of the state who advise such violations, and particularly so when such citizens are members of a profession who have taken an oath which should prevent their advising a course which violates the law, even if their honesty
26 and patriotism, without such oath, would not prevent their so advising.

I have recently addressed a letter to the various district attorneys of the state calling particular attention to the penal provisions of the Alien Land Act, and pointing out that such provisions apply to citizens as well as to aliens, and asking the most vigorous efforts in the enforcement of such act. For your information I enclose herewith a copy of such letter.

I note the final statement in your letter that 'all banks and business men are quite interested to know your opinion in this matter,' and I trust that I have fully indicated in the above the opinion that I entertain. * * *"

That as affiant is informed and believes the particular form of cropping agreement Exhibit A was submitted to the said Attorney General and the said Attorney General advised that he considered

any agreement between any citizen and alien ineligible to citizenship, covering agricultural land, wherein it was proposed to divide the products of said land upon any basis whatsoever, was objectionable under the said statute and that prosecution should be had of any persons entering into such a contract.

Wherefore Affiant prays that the preliminary injunction restraining the Attorney General and the District Attorney of Santa Clara County from prosecuting affiant under said Act may be granted.

J. J. O'BRIEN.

Subscribed and Sworn to before me this 13th day of October, 1921.

[SEAL.] HENRIETTA HARPER,
Notary Public in and for the State of California,
City and County of San Francisco.

Endorsed: Filed Oct. 13, 1921, W. B. Maling, Clerk. By Lyle S. Morris, Deputy.

27 (Title of Court and Cause.)

Motion for Temporary Injunction.

Come now the above named plaintiffs and upon their verified bill of complaint herein and the affidavit of plaintiff, J. J. O'Brien filed herein, move the Court for a temporary injunction restraining the above named U. S. Webb as Attorney General of the State of California, and C. C. Coolidge as District Attorney of the County of Santa Clara, during the pendency of the above entitled action from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing the Act of the State of California entitled "an Act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases. Prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this Act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith "against these plaintiffs or either of them upon their executing or attempting to execute a cropping contract in the form or substantially the form of the contract described in the bill of complaint herein or any other person or corporation similarly situated, and from causing the plaintiffs or either of them or any other person or corporation similarly situated to be arrested for violating the terms and provisions of said Act, and from taking any other action in any other manner to prevent or interfere with the plaintiffs or either of them from executing and delivering a cropping contract substantially in the form as described

in the bill of complaint herein and concerning the real estate
28 in said bill of complaint described.

ALBERT H. ELLIOT,
GUY C. CALDEN,
Solicitors for Plaintiffs.

Endorsed: Filed Oct. 13-1921. Walter B. Maling, Clerk, by C. M. Taylor, Deputy Clerk.

29 (Title of Court and Cause.)

(*Order That Application for Temporary Injunction be Heard.*)

The Court having considered the verified bill of complaint duly filed in the above entitled suit, and the motion of the plaintiffs for a temporary injunction therein, and it appearing to the Court that the suit is one requiring the presence at the hearing of the application for a temporary injunction of three judges, one of whom shall be a Circuit Judge of the United States.

It is by the Court ordered that the application for such temporary injunction be heard on the 26th day of October, 1921, at ten o'clock in the forenoon, in the United States District Court at the courthouse thereof in the City and County of San Francisco, State of California.

WM. C. VAN FLEET,
United States District Judge.

Dated October 13th, 1921.

Endorsed: Filed Oct. 13, 1921, W. B. Maling, Clerk, by Lyle S. Morris, Deputy.

30 (Title of Court and Cause.)

Motion to Dismiss Bill of Complaint.

Now come the defendants, U. S. Webb, as Attorney General of the State of California, and C. C. Coolidge, as District Attorney of the County of Santa Clara, State of California, and move the above entitled court to dismiss the bill of complaint herein on the ground that said bill of complaint does not state facts sufficient to constitute a cause of action against said defendants, or any of them, or to entitle said plaintiffs above named to the relief prayed for in said bill of complaint.

This motion is based upon said bill of complaint, upon this motion, upon the notice of motion served herewith, and upon all other papers, pleadings, records and proceedings in the above entitled action.

Dated November 14, 1921.

U. S. WEBB,
Attorney General of the State of California;
FRANK ENGLISH,
Deputy Attorney General,
Attorneys for Defendant U. S. Webb.
C. C. COOLIDGE,
District Attorney of the County of
Santa Clara, State of California,
Attorney for Defendant C. C. Coolidge.

Received a copy of the within motion this 14th day of November, 1921.

ALBERT H. ELLIOT AND
GUY C. CALDEN,
Attorneys for Plaintiff.

Endorsed: Filed Nov. 15, 1921, W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

31 (Title of Court and Cause.)

Notice of Hearing of Motion to Dismiss Bill of Complaint.

To the plaintiffs above named and to Messrs. Albert H. Elliot and Guy C. Calden, attorneys for said plaintiffs:

You and each of you are hereby notified that on Friday, the 18th day of November, 1921, at the hour of ten o'clock A. M. on said day, or as soon thereafter as counsel can be heard, at the court room of the District Court of the United States, in and for the Northern District of California, at the postoffice building, at the corner of Seventh and Mission Streets, at the City and County of San Francisco, State of California, the above named defendants, U. S. Webb as Attorney General of the State of California, and C. C. Coolidge, as District attorney of Santa Clara County, State of California, will appear by the undersigned as their attorneys, and call up for hearing their motion to dismiss the bill of complaint in the above entitled action, a copy of which motion is attached to this notice.

Said motion will be based upon this notice of motion, said bill of complaint, and all other papers, pleadings, records and proceedings in the above entitled action.

Dated November 14, 1921.

U. S. WEBB,
Attorney General of the State of California;
FRANK ENGLISH,
Deputy Attorney General,
Attorneys for Defendant U. S. Webb.
C. C. COOLIDGE,
District Attorney of Santa Clara County,
State of California,
Attorney for Defendant C. C. Coolidge.

32 (Here follows copy of Motion to dismiss Bill of Complaint.)

Received a copy of the within notice of motion this 14th day of November, 1921.

ALBERT H. ELLIOT AND
GUY C. CALDEN,
Attorneys for Plaintiffs.

Endorsed: Filed Nov. 15, 1921. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

33 In the Southern Division of the United States District Court for the Northern District of California, Second Division.

In Equity.

No. 654.

J. J. O'BRIEN and J. INOUYE, Plaintiffs,

vs.

U. S. WEBB, as Attorney General of the State of California, and C. C. Coolidge, as District Attorney of Santa Clara County, State of California, Defendants in Equity.

On Application for a Preliminary Injunction.

Before Hon. Wm. H. Hunt, Circuit Judge, and Hon. Benj. F. Bledsoe and Hon. M. T. Dooling, District Judges.

Albert H. Elliot, Esq. and Guy C. Calden, Esq., Solicitors for Plaintiffs.

U. S. Webb, Esq., Attorney General of the State of California, and Frank English, Esq., Deputy Attorney General of the State of California, Attorneys for Defendant U. S. Webb.

C. C. Coolidge, Esq., District Attorney, County of Santa Clara, State of California, Attorney for Defendant, C. C. Coolidge.

DOOLING, *District Judge:*

This action is brought by plaintiffs O'Brien, a citizen of the United States, and Inouye, a subject of the Emperor of Japan lawfully residing in the State of California, to restrain the defendants U. S. Webb, Attorney General, and C. C. Coolidge, District Attorney, from attempting to enforce as against them the California Alien
34 Land Law, if they enter, as they desire to do, into a certain contract,—a copy of which, designated a cropping contract, is attached to the bill. It is claimed by plaintiffs that the Act in question violates certain provisions of the Constitution of the United States, and is in conflict with treaty stipulations and with certain named sections of the Revised Statutes. It is further claimed that, even if the Act itself be held to be valid, yet the contract, which plaintiffs desire to make is not prohibited thereby, although this fact will not deter defendants from prosecuting them if such contract be made.

The Act in question provides:

"Section 1. All aliens eligible to citizenship under the laws of the "United States may acquire, possess, enjoy, transmit and inherit real "property, or any interest therein, in this state, in the same manner "and to the same extent as citizens of the United States, except as "otherwise provided by the laws of this state."

"Sec. 2. All aliens other than those mentioned in section one of "this act may acquire, possess, enjoy and transfer real property, or "any interest therein, in this state, in the manner and to the extent "and for the purpose prescribed by any treaty now existing between "the Government of the United States and the nation or country of "which such alien is a citizen or subject, and not otherwise."

"Sec. 10. If two or more persons conspire to effect a transfer of "real property, or of an interest therein, in violation of the provis-"ions hereof, they are punishable by imprisonment in the county "jail or state penitentiary not exceeding two years, or by a fine not "exceeding five thousand dollars, or both."

We have held in the case of Porterfield and Mizuno vs. Webb, et al., involving a lease, and submitted with the present action on motion for a preliminary injunction that the Act itself contravenes no
35 Constitutional provision, violates no treaty stipulation, and conflicts with no statutory enactment.

The real question for determination then is whether or no the contract in question is one the execution of which is prohibited by the Act.

The contract provides:

That the owner (O'Brien) of a certain tract of land wishes to "employ cropper (Inouye) for a period of four years as an employe for the purpose of planting, cultivating and harvesting crops to be grown on owner's land" under the terms thereafter set forth. By the terms the "owner agrees to "employ" the cropper and not to interfere with him in the planting, cultivating and harvesting of the crop and to

protect cropper during the existence of the contract against interference by any person, "the general possession of the land above described being reserved to owner." Owner agrees to provide and maintain housing accommodations for cropper; also to furnish necessary implements, tractors and gasoline for the operation of the tractors, to furnish horses and feed for planting, cultivating and harvesting the crops provided for, to furnish all things necessary for the proper farming of the land, and also to haul the crop when properly prepared by cropper for hauling, and shipping, to the packing house or station; to "permit" cropper to work the land on the conditions set forth provided "cropper shall have no interest or estate whatsoever in the land described herein;" to give to cropper fifty per cent of all crops grown during the period of the agreement, "as compensation for the services and labor of the cropper as herein set forth." Also, "to grant to the cropper his right to a division of the crop after it is harvested and before its removal from the land, provided that the cropper exercises his option thereunto." And
36 in the event of the exercise of such option, to grant to cropper the right to remove from the land his share of the crops within a reasonable time even though said time should extend beyond the term of cropper's employment. Also to grant to cropper the right to carry out the terms of his agreement by employing such agents or employes as he sees fit and to give them free ingress or egress over the property, and the right to live therein without let or hindrance. The cropper agrees to plant, cultivate and harvest strawberries, raspberries, loganberries and vegetables, in good farmlike manner; to maintain and keep up the personal property and return to the owner implements which may have been supplied to him in good condition; to keep the irrigation ditches and levees in good order and prevent loss of irrigation water; to harvest all crops when ripe, and to pack and prepare the same for shipping and transportation if necessary. It is mutually agreed that if the land is sold during the agreement the owner may terminate the agreement by paying the cropper for his services at the rate of $100.00 per month from the beginning of the calendar year in which the agreement is terminated, together with moneys expended by the cropper, for labor and material furnished for planting and cultivating. Further mutual agreement is that in case of breach on the part of the owner, or in case of any hindrance with or prevention of farming upon any part of said land, owner agrees to pay the cropper for money expended by cropper for planting and cultivation of the then growing crops, together with twenty per cent of the moneys expended by the cropper as liquadated damages for the cancellation of the agreement.

37 In a cropping contract the cropper has no estate in the land. He may be physically upon the land, and have possession of the crops, yet such possession is that of a servant who receives his pay in a certain proportion of the crop. Whether an agreement for the occupation of farming land is a lease or a crop contract depends on the intention of the parties as gathered from the words of the agreement when it has been reduced to writing. In the contract

under consideration nothing is said about leasing or letting the premises or of paying anything as rent, and so far as the language used aids us it is merely an agreement to till the land on shares and divide the crop, which would make the parties tenants in common of the crop while growing and when matured. Connell vs. Richmond, 55 Conn., 401, 11 At. 852.

The length of the term may be considered, but it is not a determining factor. Walker vs. Fitts, 24 Pickering 191; Guest vs. Opdyke, 31 N. J. L. 552; Aiken vs. Smith, 21 Vt. 172.

In the last case the Court held there was no tenancy, although the letting for crop rent was to continue for five years, yet the contract contained technical words appropriate to a lease i. e. the words, "agree to let."

Under the instrument under consideration the cropper has no interest in the land, merely receiving his share of the crop as the price of his labor. The "general possession of the land" is expressly reserved to the owner, and he alone could maintain trespass. Adams vs. McKesson, 53 Penn. St. 81; Williams vs. Clever, 4 Houston (Del.) 453.

The duty of the owner is to divide off to the cropper his share of the crop. And until the cropper exercises his right to a division of the crop after it is harvested and before removal, the whole
38 title remains in the owner of the land. McNeeley vs. Hart, 10 Iredell, (N. C.) 63; Brazier vs. Ansley, 11 Iredell (N. C.)
12.

An agreement by which the one party is to furnish the land and the stock and the other to do the work, the crop to be divided equally between them, is one of hiring, and not of landlord and tenant. Hunt vs. Mathews, 132 Ala. 286; 31 So. 613.

In Hudgins vs. Wood, 72 N. C. 256, the agreement referred to services and the landowner agreed to supply house and teams and to give one-half of the crops in pay for services. It was held there was no tenancy.

In Taylor vs. Donahoe, (Wis.) 103 N. W. 1099, there was a written agreement for the cultivation of certain lands owned and controlled by Donahoe, whereby Finnegan was to cultivate, do all work of raising crops and marketing during his term of service, to furnish certain stock, seeds, etc. There were stipulations regarding sharing expenses and Donahoe was to pay Finnegan "in full compensation for his services one-third of the crops." The agreement was characterized as a personal agreement. Finnegan was to have the use of the dwelling house on the lands, except parts which Donahoe reserved for his own use. Chief Justice Winslow said: "The distinction between a tenant and a cropper is that a tenant has an estate in the land for a given time and a right of property in the crops, and hence makes the division thereof between himself and the landlord in case of an agreement upon shares, while a cropper has no estate in the land nor ownership of the crops but is merely a servant and receives his share of the crops from the landlord in whom the
39 title is. It is always a question of construction of the agreement under which the parties are acting. The agreement in

question here seems to us to be very clear and definite upon the subject. It no where refers to Finnegan as a tenant, but specifically refers to his work as "service" and expressly provides that Donahoe shall pay him for his services by certain shares of the crops, and that the possession of the land and ownership of the crops are to remain in Donahoe, and that Finnegan is merely to be and employe in the tilling of the land and caring for the stock. Language could hardly be plainer or more appropriate for the purpose of creating a cropper arrangement."

In Williams vs. Clever, (Del.) 4 Houston 458, (supra) the statute of the state was recognized as providing that any contract or consent pursuant to which the tenant should enter into or continue in possession of lands under an agreement to pay rent should be a demise, but where there was no agreement between the owner and him who entered into possession that the latter was to pay rent for use and occupation, and the right of tilling and cropping, in that event though he were let into possession for that purpose, it would not be a demise or a renting within the meaning and definition of the statute. The Court saying: "But, if he was not in possession as before stated, under an agreement to pay rent to the defendant, but only as a cropper to be paid for his services as such in one-third of the produce, he would not be entitled to maintain the action of trespass."

In Currey vs. Davis, 1 Houston (Del.) 598, there was a verbal agreement between the owner and a man whereby the latter should till and cultivate for a proportion of the crop. The court held that the facts did not establish a demise of the premises so as to establish the legal relation of landlord and tenant, but that the agreement was nothing more than, and should be considered only as, an agreement for raising at their mutual expense and labor a crop of wheat on shares between them. In the agreement itself nothing was said about leasing or letting or about rent. "And this would constitute them owners or tenants in common of the crop while growing and when matured until it was severed and so apportioned between them, etc."

Bernal vs. Hovious, 17 Cal. 541, was a case where the Bernal agreement in relation to use and cultivation between the parties was called a lease by the parties. Under its terms Vasques was to furnish the seed, two teams and sacks, and Bernal was to do the work and to give him for the use of the land one-third of the grain raised. Field, C. J. held that although the parties designated the agreement as a lease it was not one, but was a contract for the working of the farm upon shares and cited Putnam vs. Wise, 1 Hill (N. Y.) 235, and Caswell vs. Districh, 15 Wendell 379, to the effect that Vasques and Bernal were tenants in common of the grain to be divided.

Clark & Kane vs. Cobb, 121 Cal. 595, referred to Bernal vs. Hovious as containing facts different from those presented in the case under consideration, and regarded the case then at bar as presenting a relationship of landlord and tenant rather than as a cropping contract. But in that case the land was, by provision of the contract "demised and let for a term of years."

In Walls vs. Preston, 25 Cal. 59, plaintiffs, intestate, "demised, leased and to farm, let" the premises "to have and to hold" for two years. Preston covenanted not "to under-let" the premises "or yield the possession thereof "to any but Vera." The court recog-
41 nizing that parties could make a lease or an agreement constituting them tenants in common of the crops and at the same time provide that the owner or occupant might hold possession, or that both might be tenants in common of the land during the term mentioned in the agreement, held, however, that in that instance the parties intended to make a lease and that the instrument was a lease.

In State vs. Jewell, Collector, N. J. L., Vol. 34, p. 259, there was an agreement whereby one Price cultivated and received for his labor and services as farmer a certain share of the products, and he lived in a small house on a part of the farm. The court said a contract between the owner of lands and a third person that the latter shall work the farm on shares, the products to be divided between them is not a lease. "Such an arrangement does not create the relation of landlord and tenant. The occupier by virtue of an agreement of this kind becomes simply a tenant in common with the other contracting party, of the growing crops, and this joint interest continues until it is severed by a division. An agreement between the owner and A that the latter shall manage the farm for a stipulated sum per week and be allowed to reside in and have the use of a dwelling house and furniture therein free of rent, is not a demise of the house, the occupation of it being a mere remuneration in part for services."

In Guest vs. Opdyke, 31 N. J. L. 552, there was a verbal agreement to the effect that one party should work the farm on shares with right of occupancy of part of the house and provision for division of part of the crops. The court held that the position that
42 one of the parties was the tenant of the other was not tenable. That the arrangement, strictly speaking, was not a lease, nor did it constitute the defendant a tenant. "The opposite doctrine would be attended with much inconvenience if not positive mischief. Landlords are induced to put out their farms in this mode to tenants who are poor, relying as they imagine on the certainty that their share of the produce cannot be diverted or in any wise encumbered. Whereas, if these agreements are complete leases, the title to the crops produced vests in the occupiers, and the landlord would have no claim upon them until a division should have been made, and then his share would come to him as a *reditus* or rent. Such is not the light in which the law regards this species of contract. On the contrary the true construction is that by virtue of such agreements the occupier becomes simply a tenant in common, with the other contracting party of the growing crop and that this joint interest continues until it is severed by a division."

In Aiken vs. Smith, 21 Vt. 172, supra, the court said that under the facts it was difficult to determine with precision what was the exact relationship of the parties, but it is to be observed that in that

case Smith agreed to let his farm for five years, Austin to take certain produce and to do certain repairs. The Court held, however, that although Austin had an interest in the land and was not merely the servant and did not occupy for hire but had a right to occupy, it was yet quite apparent that the intention of the parties was not to constitute a lease and that while certain words were used which were apt to make a lease, the court would not treat it as such but would regard Austin as not the occupant for a certain term, but as a quasi occupant at will, so long as the parties should agree
43 and be satisfied, not exceeding five years.

Caswell vs. Districh, N. Y., 15 Wendell 379, and referred to in cases above cited, seems to run through the books as a leading one. There plaintiff, as executrix brought an action of assumpsit against Districh for rent. Relying upon an agreement whereby testator agreed to let the defendant have his farm for one year, Districh to farm it and give one-third of the crops, defendant insisted that the instrument was an agreement to work on shares and not a lease securing rent, and that an action for rent would not lie. The trial court granted a non-suit and the supreme court held the agreement was a letting upon shares and technically not a lease; that there was nothing to indicate that the stipulation for appropriation of the crops was by way of rent, and that it was material that this view should be maintained "unless otherwise clearly expressed" for then the landlord would have an interest to the extent of his share in the crops. Whereas, if it is deemed rent the whole interest belongs to the tenant until a division. "Where a farm is let for a year upon shares, the landlord looks to his interest in the crops as his security, and thereby is enabled to accommodate tenants who otherwise would not be trusted for the rent."

In Jones on Landlord and Tenant, Sec. 49, the author lays it down that if one be hired to work land receiving for his compensation part of the produce, he is a cropper and not a tenant having no interest in the land but receiving his share as the price of his labor. "The possession is still in the owner of the land who alone can maintain trespass, nor can he distrain for he does not maintain the relation of landlord and tenant."

44 In Warvelle on Ejectment, Sec. 26, the author says that it is common for persons to enter into agreements for the cultivation of land on shares, one person contributing the use of land while another plants and cultivates the crop which when harvested is divided between them. "It is well settled that such an agreement does not create a tenancy of any kind on the part of the cultivator. At best he is only a tenant in common of the crop which is generally regarded as personalty, and the legal possession of the land is in the owner."

Taylor, Landlord and Tenant, Vol. 1, Sec. 24-A, says that while the tenancy of the later cases is to construe the agreement as a lease whenever rent as such is reserved or apt terms of demise are employed, or the intention to create a lease is clearly to be inferred from the words, yet if there appears no agreement for rent, demise,

or occupation, but merely for services to be paid for by part of the crop, the occupant for purposes of cultivation is merely a cropper, having no interest in the crops until division.

In Pearson vs. Lafferton (Mo.) 193 S. W. 40, the Supreme Court referred to the divergences of opinion, as to the ownership of the crops, but said the trend is to hold that a contract whereby one is allowed the use of land to cultivate, the owner to have a share of the produce for its use, will in general at least create a tenancy in common in the growing crop, and that this is so whether the agreement operates as a lease or a mere cropping contract. The contract there considered was regarded as a cropper's contract.

From this general résumé of cases and consideration of the contract under investigation, it appears that the intention of the
45 parties, as far as it can be gathered from the instrument itself is to make a cropper's contract and not a lease. There is nothing to prevent an owner and a farmer from agreeing to a cropper's contract to extend over a period of years and where, as here, both enter into it with the knowledge that the one party can under the law of the state in which the contract is made, have no inerest in the realty and can make no lease of the realty, a forced construction should not be put upon the contract in order to bring it within the prohibition of the law.

It would be indeed a strain to say that an alien may not enter into a contract for agricultural purposes; unless, of course, the law is very clear and unambiguous in preventing him from doing so. Being lawfully within the United States and lawfully an inhabitant of the State of California, his right to the ordinary pursuit of agriculture is not to be deemed curtailed, provided always he does not acquire an interest in the land which he is cultivating. That being so, and both he and O'Brien having the right to enter into a cropper's contract carrying no interest in the land, and there being nothing in the agreement under consideration which on its face shows fraud or bad faith, and nothing which indicates that the parties intend to make a lease, the Court should not say that the agreement is other than what it purports to be, that is, an agreement for cropping, with general possession and ownership in O'Brien, and with the kind of crops specified that the alien shall raise, his share of which is to be granted to him by the owner, after the crop is harvested. If such contract had been entered into in California before the adoption of the Alien Land Law, it is
46 very doubtful whether any Court would ever have been asked to declare it other than a cropper's agreement. The great purpose of the statute of California was apparently to prevent ownership and legal interest in farming lands from passing to aliens who never could become citizens. And there is nothing from which it can be legitimately inferred that the design of the law is to prevent an alien from entering into a cropping agreement whereby he gives his labor for a share in the crops to be raised.

Assuming for the instant that the state has the power to inhibit an alien inadmissible to citizenship from making a contract to farm on shares, it seems quite clear that the statute under consideration

has not attempted to make such a contract unlawful. Rather does it seem that by expressing only prohibition against transferring land or an interest therein the framers of the statute meant to go no farther and not to prevent cropping agreements whereby the labor by the alien may not be interfered with. Such agreements in this State are, and have been for years, well-known, and, if it were intended to include them within the statute, it would have been a very simple matter to have embraced them within the expressed provisions of the law. The most that can be conceded to the position of the State authorities is that it is very doubtful whether the contract under consideration pertains to a transfer of an interest in land, and under such circumstances, landowners and aliens should not be subjected to numerous and State-wide prosecutions for entering into similar contracts until it has been determined by the Appellate Tribunals that such contracts are prohibited. That may readily be determined in this action without a multiplicity of prosecutions.

47 If such contracts are ultimately held to be unlawful it means only that prosecution of those who have made them has been for a short time postponed. If they are ultimately held to be lawful it means that individuals who have broken no law shall have been spared harassing trials, and the State futile, and it may be, expensive prosecutions.

Holding these views, we are of the opinion that the preliminary injunction prayed for should be granted, and it is so ordered.

Endorsed: Filed Dec. 20 1921. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

48 In the District Court of the United States in and for the Northern District of California, Southern Division.

654. Equity.

J. J. O'BRIEN and J. INOUYE, Plaintiffs,

vs.

U. S. WEBB, as Attorney General of the State of California, and C. C. Coolidge, as District Attorney of the County of Santa Clara, State of California, Defendants.

Concurring Opinion.

BLEDSOE, *District Judge* (concurring):

The court in the companion case brought in the Southern District of California (Porterfield and Mizuno vs. Webb, as Attorney General) having held the Alien Land Law constitutional and valid, the proper construction of the so called croppers contract herein, with a view to determine whether it violates such law, is really a local, as opposed to a Federal, question. Its decision, however, by this specially constituted tribunal, under the circumstances, seems proper. (L. & N. R. R. Co., v. Garrett, 231 U. S. 298; Siler v. L. & N. R. R. Co., 213 U. S. 175.)

The contract, here, in my judgment, is not to be measured by the usual yardstick—the intent of the parties as gathered from the language used It was not entered into in the ordinary course of business by men dealing at arm's length. To my mind it exhibits a subtle attempt to save the substance through the sacrifice of the form. Read in the light of the surrounding circumstances—the attack on the constitutionality of the law and the numerous sorts of farming contracts recited in the complaint as having been passed upon adversely by the Attorney General—it indicates a studied effort on the part of the signatories to negotiate a contract which,
49 while according to the alien all the substantial privileges of a lease, yet, through the efficacy of mere words, would protect him and his landlord against a violation of the law in question.

If the contract is one merely of employment—a cropping contract—why did the parties find it necessary to agree that the owner of the land should not "interfere with him (the cropper) in the planting, cultivating and harvesting of the crop—*in any way*" and that he should "protect the cropper during the existence of this contract against interference by any person whatsoever"? Why also, if it was to be an ordinary cropping contract, did the owner specially agree to grant the cropper the right to carry out the terms of this agreement by employing such agents or employes as he shall see fit and give to such agents of employes, free ingress or egress from said property, or the right to live thereon *without let or hindrance"?* In the light of these positive specially noted covenants on the part of the owner of the land, how much substance is there to the formal reservation by him of "the *general* possession of the land." (Italics supplied.)

The only question involved herein is whether the contract set out, if enforced, will serve to enable the Alien Inouye, "to acquire, possess or enjoy any interest in real property." If it will, or if it will serve to effect a transfer of an interest in real property, even "though colorable in form" (Sec. 9, Cal. Alien Land Law), it is prohibited by the law. In Words and Phrases, Vol. IV, p. 3699, it is said that the word "interest" is the broadest term applicable to claims in or upon real estate, in its ordinary signification among the men of all classes. "It is broad enough to include any right, title or estate in, or lien upon, real estate." The Supreme Court of Massachusetts, in Union Trust Co., v. Reed, 213 Mass. 199, said the word "interest" in common speech, in connection with land, includes all varieties of titles and rights and comprehends estates in fee, for life, and for years, mortgages, liens, easements, attachments and every kind
50 of claim of land which can form the basis of a property right.

We have in this case actual possession, uninterfered with and unhindered, for a full period of four years, of a particularly described tract of agricultural land, being accorded to the alien and to his agents and employes, by a contract in writing, together with the further right, within a reasonable time, after the termination of the contract to return upon the land for the purpose of removing his half of the crops to be grown thereon. It seems clear to me, despite the actual words used to evidence the agreement, that the alien, in

pursuance of such contract, will be in enjoyment of an interest in—an enforceable right in and to—the land in question.

Surely the alien and his employes would be enabled to maintain an action for trespass (Lightner Min. Co., v. Lane, 161 Cal. 689), a right under the circumstances possibly not open to the owner. (Uttendorffer v. Saegers, 50 Cal. 496.) Tiffany in his work on Real Property, Vol. I, p. 121, says:— "If the effect of the arrangement is to give to the cultivator the possession of the land, the exclusive possession as it is frequently termed, a tenancy is created." If the right of a cultivator of land to cultivate it without interference "in any way," "by any person whatsoever," and the right of his various employes to live on the land "without let or hindrance" for a period of years, does not involve an exclusive possession on his part, it is difficult to characterize the real nature of the arrangement.

The contract does contain, however, the following portentous language:— "Provided that the cropper shall have *no interest or estate whatsoever* in the land described herein." (Italics supplied.)

If this clause truly reflects the real nature of the arrangement entered into, and be not overcome in effect by other provisions inconsistent therewith, the contract is not invalidated because of
51 the prohibition of the Alien Land Law. Without attempting to construe the contract definitely, in the light of this and other provisions, I am persuaded that the clause quoted will operate as an estoppel, in favor of either party to the contract, no less than in favor of the state, in the event, under appropriate proceedings, a right in the land on the part of the alien should be asserted.

For this reason, I concur in the judgment.

December 19, 1921.

Endorsed: Filed Dec. 20, 1921. W. B. Maling, clerk, by J. A. Schaertzer, deputy clerk.

52 At a stated term, to-wit, the November term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the court room, in the city and county of San Francisco, on Tuesday, the 20th day of December, in the year of our Lord one thousand nine hundred and twenty-one.

Present: The Honorable Maurice T. Dooling, District Judge.

No. 654. Equity.

J. J. O'BRIEN and J. INOUYE

vs.

U. S. WEBB, etc., et al.

(Order Granting Application for a Preliminary Injunction.)

Plaintiffs' application for a preliminary injunction heretofore heard and submitted, being now fully considered and the Court

having filed its Opinions thereon, it is ordered that said application for a preliminary injunction be and the same is hereby granted.

53 (Title of Court and Cause.)

Petition for Appeal and Order Allowing Appeal.

The above named defendants U. S. Webb, as attorney General of the State of California, and C. C. Coolidge, as District Attorney of Santa Clara County, State of California, conceiving themselves aggrieved by the order made and entered in the above entitled proceeding on December 20, 1921, granting an interlocutory injunction in the said proceeding, do hereby appeal from said order to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith and do pray that this, their appeal, may be allowed and that citation be issued as provided by law and that a transcript of the record and proceedings and papers upon which said order was based, duly authenticated, be sent to the Supreme Court of the United States sitting at the City of Washington, in the District of Columbia, under the rules of such court in such cases made and provided, and your petitioners further pray that the proper order relating to the security to be required of them be made.

Dated: January 20th, 1922.

U. S. WEBB,
Attorney General of the State of California,
FRANK ENGLISH,
Deputy Attorney General,
Attorneys for Defendant U. S. Webb.
1212 Humboldt Bank Building, San Francisco, California.
C. C. COOLIDGE,
District Attorney of Santa Clara County,
State of California, Attorney
for Defendant C. C. Coolidge.

Court House, San Jose, California.

And now, to-wit, on this 20 day of January, 1922, it is ordered that the foregoing appeal be and it hereby is allowed as prayed
54 for upon giving bond as required by law in the sum of Five Hundred Dollars.

M. T. DOOLING,
District Judge.

Endorsed: Filed Jan. 20, 1922, W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

55 (Title of Court and Cause.)

Assignment of Errors on Appeal from Order Granting Plaintiff's Application for an Interlocutory Injunction.

Now come U. S. Webb, Attorney General of the State of California, and C. C. Coolidge, District Attorney of Santa Clara County, State of California, defendants and appellants, and make and file this their assignment of errors, upon which they will rely upon their appeal from the order made and entered in the above entitled proceeding on the 20th day of December, 1921, granting the application of plaintiffs and appellees for interlocutory injunction against said defendants and appellants.

I.

The United States District Court of the Northern District of California, Southern Division, (Hon. William H. Hunt, Hon. Maurice T. Dooling and Hon. Benjamin Bledsoe sitting) erred in granting plaintiffs' application for an interlocutory injunction, enjoining defendants from enforcing the provisions of the act hereafter referred to of the people of the State of California relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in the State of California, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of the said act, prescribing penalties for violation of the provisions thereof and repealing all acts or parts of acts inconsistent or in conflict therewith, for the following reasons:

1. The act of the people of the State of California above described adopted by vote of the people on November 2, 1920, and in effect December 9, 1920, and printed in the Statutes of the State
56 of California for 1921 at page lxxxiii, prohibits the act described in the bill of complaint in the aforesaid action as being contemplated to be done by the aforesaid plaintiffs, to-wit, the making and entering into a so-called "cropping contract," which said "cropping contract" is set forth as "Exhibit A" attached to the bill of complaint in the aforesaid proceeding.

2. The aforesaid act of the people of the State of California authorizes and directs defendant and appellant U. S. Webb, as Attorney General of the State of California, and C. C. Coolidge, as District Attorney of Santa Clara County, State of California, to bring proceedings at law against the said plaintiffs and appellees for the purpose of enforcing the said act of the people of the State of California against the said plaintiffs and appellees, the bringing of which proceedings at law have been enjoined by the order granting the application of the plaintiffs and appellee for an interlocutory injunction herein, from which order the appeal herein is prosecuted.

II.

The said United States District Court erred in holding and finding that under the said "cropping contract" so described in the bill or complaint herein plaintiff and appellee, J. Inouye, an alien ineligible to citizenship in the United States, would not acquire real property in the State of California, or any interest in said real property.

III.

The said United States District Court erred in holding and finding that under the said "cropping contract" so described in the bill of complaint herein plaintiff and appellee, J. Inouye, an alien ineligible to citizenship in the United States, would not possess real property in the State of California, or any interest in said real property.

57

IV.

The said United States District Court erred in holding and finding that under the said "cropping contract" so described in the bill of complaint herein plaintiff and appellee, J. Inouye, an alien ineligible to citizenship in the United States, would not enjoy real property in the State of California, or any interest in said real property.

V.

The said United States District Court erred in holding and finding that under the said "cropping contract" so described in the bill of complaint herein plaintiff and appellee, J. J. O'Brien, would not transfer real property in the State of California, or any interest in said real property, to said plaintiff and appellee J. Inouye.

Wherefore defendants and appellants pray that said order granting an interlocutory injunction be reversed.

Dated: January 20, 1922.

U. S. WEBB,
Attorney General of the State of California;
FRANK ENGLISH,
Deputy Attorney General,
Attorneys for Defendant and Appellant, U. S. Webb.
C. C. COOLIDGE,
District Attorney of Santa Clara County,
State of California, Attorney
for Defendant and Appellant, C. C. Coolidge.

Endorsed: Filed Jan. 20, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

58 (Title of Court and Cause.)

Bond on Appeal.

Know all men by these presents:

That we, U. S. Webb, Attorney General of the State of California, and C. C. Coolidge, District Attorney of Santa Clara County, State of California, as principals, and Fidelity and Deposit Company of Maryland, a Corporation, created, organized and existing under and by virtue of the laws of the State of Maryland as surety, are held and firmly bound unto J. J. O'Brien and J. Inouye, in the sum of Five hundred Dollars, lawful money of the United States, to be paid to them, to which payment well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 25th day of January, 1922.

Whereas the above named defendants, U. S. Webb and C. C. Coolidge, have appealed to the Supreme Court of the United States from an order made and entered in the above entitled proceeding by the United States District Court in and for the Northern District of California, Southern Division, on the 20th day of December, 1921, granting plaintiffs' application for an interlocutory injunction,

Now therefore the condition of this obligation is such that if the above named defendants shall prosecute their said appeal to effect and answer all costs, if they fail to make good their plea,

59 then this obligation shall be void, otherwise the same shall remain in full force and effect.

U. S. WEBB.
C. C. COOLIDGE.
FIDELITY AND DEPOSIT CO. OF MD.,
By F. E. BRISBINE, [SEAL.]
Attorney in Fact,
By M. F. CARLETON,
Agent.

(The premium charged for this bond is Ten Dollars per annum.)

The above and foregoing bond and the surety thereon are approved this 26 day of January, 1922.

M. T. DOOLING,
District Judge.

Endorsed: Filed Jan. 26, 1922. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

60 (Title of Court and Cause.)

(*Præcipe for Record on Appeal.*)

To the clerk of the aforesaid court:

Please issue a certified copy of the records in the above entitled proceeding, consisting of the following papers:

1. Plaintiffs' bill of complaint.

2. Affidavit of J. J. O'Brien on application for interlocutory injunction under section 266 of the Judicial Code.

3. Plaintiffs' motion for temporary injunction.

4. Order of United States District Judge William C. Van Fleet that the application for temporary injunction be heard.

5. Defendants' motion to dismiss bill of complaint.

6. Notice of hearing of motion to dismiss bill of complaint.

7. Opinion of District Judge Maurice T. Dooling.

8. Concurring opinion of District Judge Benjamin F. Bledsoe.

9. Order entered herein December 20, 1921, granting interlocutory injunction.

10. The petition for appeal and order allowing same.

11. Assignment of errors on appeal from order granting interlocutory injunction.

12. Citation on appeal from order granting interlocutory injunction.

13. Præcipe for transcript of record.

Said record to be certified under the hand of the clerk and the seal of the court.

Dated: January 20, 1922.

U. S. WEBB,
Attorney General of the State of California;
FRANK ENGLISH,
Deputy Attorney General,
Attorneys for Defendant and Appellant U. S. Webb.

61 C. C. COOLIDGE,
District Attorney of Santa Clara County,
State of California,
Attorney for Defendant and Appellant C. C. Coolidge.

Receipt of a copy of the foregoing Præcipe is hereby admitted this 20th day of January, 1922, and it is hereby stipulated and agreed that the papers mentioned and described therein are all the

papers necessary to a determination by the Supreme Court of the United States of the appeal prosecuted by said appellants, and that such record shall constitute the transcript of record on appeal from the order appealed from and that said appeal may be heard and determined upon such transcript of record.

ALBERT C. ELLIOT,
GUY C. CALDEN,
Attorneys for Plaintiffs and Appellees.
U. S. WEBB,
Attorney General of the State of California;
FRANK ENGLISH,
Deputy Attorney General,
Attorneys for Defendant and Appellant U. S. Webb.
C. C. COOLIDGE,
District Attorney of Santa Clara County,
State of California,
Attorney for Defendant and Appellant C. C. Coolidge.

Endorsed: Filed Jan. 20, 1922. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

62 In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 654. Equity.

J. J. O'BRIEN and J. INOUYE, Plaintiffs,

vs.

U. S. WEBB, as Attorney General of the State of California, et al., Defendants.

Clerk's Certificate to Record on Appeal.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing sixty-one (61) pages, numbered from 1 to 61, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the præcipe for record on appeal in the above-entitled cause, as the same remains of record and on file in the office of the Clerk of said Court, and that the same constitutes the record on appeal to the Supreme Court of the United States.

I further certify that the cost of the foregoing transcript of record is $26.30; that said amount was paid by the defendants and that the original citation issued in said cause is hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 27th day of January, A. D 1922.

[Seal of the U. S. District Court, Northern District of California.]

WALTER B. MALING,
Clerk United States District Court for the Northern District of California.

63 Original.

In the Southern Division of the United States District Court, Northern District of California, Second Division.

In Equity.

No. 654.

J. J. O'BRIEN and J. INOUYE, Plaintiffs,

vs.

U. S. WEBB, as Attorney General of the State of California, and C. C. Coolidge, as District Attorney of Santa Clara County, State of California, Defendants in Equity.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to J. J. O'Brien and J. Inouye, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington, in the District of Columbia, on the 20th day of February, 1922, pursuant to an order allowing an appeal filed in the Clerk's office of the District Court of the United States for the Northern District of California, Southern Division, from an order made and entered on the 20th day of December, 1921, in that certain proceeding being in equity No. 654, wherein U. S. Webb, as Attorney General of the State of California, and C. C. Coolidge as District Attorney of Santa Clara County, State of California, are defendants and appellants, and you, J. J. O'Brien and J. Inouye, are
64 plaintiffs and appellees, to show cause, if any there be, why the said order rendered against the said defendants and appellees, as in said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable M. T. Dooling, District Judge for the Northern District of California, Southern Division, this 20th day of January, 1922.

M. T. DOOLING,
United States District Judge for the Northern District of California, Southern Division.

65 [Endorsed:] In Equity No. 654. In the Southern Division of the United States District Court Northern District of California. Second Division. J. J. O'Brien and J. Inouye, Plaintiffs, vs. U. S. Webb, etc., et al., Defendants in Equity. Citation on Appeal. Filed Jan. 20, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. U. S. Webb, Attorney General, Attorney for Defendant U. S. Webb, 1212 Humboldt Bank Building, San Francisco.

Due service and receipt of a copy of the within citation is hereby admitted this 20th day of January, 1922.

ALBERT C. ELLIOT &
GUY C. CALDEN,
Attorneys for Plaintiffs and Appellees.

Endorsed on cover: File No. 28,692. N. California D. C. U. S. Term No. 737. U. S. Webb, as attorney general of the State of California, and C. C. Coolidge, as district attorney of Santa Clara county, State of California, appellants, vs. J. J. O'Brien and J. Inouye. Filed February 4th, 1922. File No. 28,692.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1922.

No. 267.

U. S. WEBB, AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, AND C. C. COOLIDGE, AS DISTRICT ATTORNEY OF SANTA CLARA COUNTY, STATE OF CALIFORNIA,

Appellants,

vs.

J. J. O'BRIEN AND J. INOUYE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLANTS.

STATEMENT OF FACTS.

This case involves the sole question whether entering into a so-called "cropping contract," which is set out at pages 6 to 9 of the transcript as "Exhibit A" annexed to the bill of complaint filed by plaintiffs in the District Court of the United States for the Northern District of California, is a violation of the Alien Land Act of California adopted by the people in 1920. The said Alien Land Act is annexed as "Exhibit A" to this brief. This

act prohibits the acquisition, possession and enjoyment of real property or any interest therein by aliens ineligible to citizenship, or the transferring of such real property or any interest therein to such ineligible aliens.

The United States District Court construed the said statute as not prohibiting the entering into such a "cropping contract." The statute had theretofore never been construed by the State Supreme Court on this point, and therefore the United States District Court found it necessary to itself construe the statute. The statute has not up to the time of the writing of this brief been construed by our State Supreme Court so far as this point is concerned. There is now pending before the California Supreme Court a case involving a cropping agreement very similar to the one here before the court, and we are urging the state court to construe the statute as prohibiting such contracts.

The petition filed in the United States District Court recites that J. J. O'Brien, a citizen of the United States, and J. Inouye, a subject of the Emperor of Japan, bring their bill of complaint against the Attorney General of the State and the District Attorney of the County of Santa Clara, California, to enjoin criminal proceedings and also escheat proceedings by said officials against plaintiffs on account of their having entered into the cropping agreement. O'Brien owned certain agricultural lands in the said County of Santa Clara

adapted to the raising of strawberries, loganberries, raspberries and vegetables, and Inouye, an alien ineligible to citizenship in the United States, is described as a capable farmer qualified and competent to enter into the said "cropping contract" for the growing of crops upon this property. It is recited that O'Brien wishes to execute the said "cropping contract" with said Inouye for a period of four years, and Inouye wishes to enter into the agreement with O'Brien. The California act is described in the complaint as being in violation of the constitution of the United States. We shall not discuss in this brief the question of the validity of the statute in its relation either to the United States constitution or to the existing treaty between the United States and Japan. That question will be discussed in the companion case which is set down for hearing before the Supreme Court at the same time as this case; that is, *Porterfield et al.* vs. *Webb, etc., et al.*, October term, 1922, No. 299.

In the case at bar the court, with the three judges sitting as required by statute, on application for a temporary injunction, granted a temporary injunction against appellants enjoining them from instituting proceedings either criminal or by way of escheat to the state of the real property involved. The sole ground for the court's decision was that the cropping contract did not violate the state statute, inasmuch as the contract did not vest in the cropper any interest in real property. The court was of the

opinion that it made of him merely an employee of the land owner. We are prosecuting this appeal to the United States Supreme Court, from said decision.

In the *Porterfield* case the same court refused a temporary injunction to plaintiffs who attempted to enter into an admitted lease of agricultural land between a citizen land owner and an ineligible alien. The court held that the California statute prohibiting such a lease did not violate either the United States constitution or the existing treaty between the United States and Japan. The complainants are appealing to the United States Supreme Court, from the decision in the *Porterfield* case.

ASSIGNMENT OF ERRORS.

Appellants submit that the United States District Court erred in granting plaintiffs' application for an interlocutory injunction for the reasons:

I.

That the act of the people of the State of California adopted by vote of the people on November 2, 1920, in effect December 9, 1920, and printed in the Statutes of the State of California for 1921 at page lxxxiii, prohibits the act described in the bill of complaint in this action as being contemplated to be done by the said plaintiffs, to wit, the making and entering into the so-called "cropping contract," which said "cropping contract" is so set forth as

"Exhibit A" and so attached to the bill of complaint in this proceeding.

II.

The said United States District Court erred in holding and finding that under the said "cropping contract" the said plaintiff and appellee, J. Inouye, an alien ineligible to citizenship in the United States, would not *acquire* real property in the State of California or any interest in said real property.

III.

The said United States District Court erred in holding that under the said "cropping contract" the said plaintiff and appellee, J. Inouye, would not *possess* real property in the State of California or any interest in said real property.

IV.

The said United States District Court erred in holding that under the said "cropping contract" the said plaintiff and appellee, J. Inouye, would not *enjoy* real property in the State of California or any interest in said real property.

V.

The said United States District Court erred in holding that under the said "cropping contract" the said plaintiff and appellee, J. J. O'Brien, would not *transfer* real property in the State of California or any interest in said real property to said plaintiff and appellee, J. Inouye.

ARGUMENT.

I.

THE LANGUAGE OF THE CALIFORNIA STATUTE AND OF THE "CROPPING CONTRACT" CONSIDERED, AS REVEALING THE ISSUE PRESENTED TO THE COURT.

The California statute adopted by vote of the people in 1920, in section 1 thereof, provides that "all aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transfer and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state."

Section 2 provides that "all aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent, and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

Section 8 of the act provides that in the event of any interest in real property less than a fee being acquired in violation of the act by such an ineligible alien the property shall escheat to the State of California. It is made the duty of the Attorney General or District Attorney of the proper county to institute proceedings to have such escheat adjudged and enforced.

Section 10 of the act provides for criminal prosecution against persons conspiring to effect a transfer of real property or any interest therein in violation of the provisions of the act.

The treaty of February 21, 1911, between the United States and Japan grants no right to the citizens or subjects of either of the high contracting parties to acquire any interest in lands in the other country for agricultural purposes. The only right given to acquire an interest in land, is that described in article I of the treaty which grants to the citizens or subjects of each of the high contracting parties the right "to lease land for residential and commercial purposes."

The question to be determined by the court is whether there is in the cropper in this case any "interest in real property"; that is, whether he would "acquire" or "possess" or "enjoy" or have "transferred" to him any interest in real property in the State of California by reason of the cropping contract here being considered.

We shall throughout this brief refer to the defendant, J. Inouye, as a "cropper" and to the agreement proposed to be entered into as a "cropping contract." We shall go rather extensively into the distinctions that have been drawn by the courts between "leases" and "cropping contracts," but for our purposes we call this agreement a "cropping contract," and claim that, in fact, it would create such an interest in real

property, in the ineligible alien, as is prohibited by the California statute.

The contract states that the owner wishes to employ "cropper" and that this employment shall be "for a period of four (4) years, being from the first day of December, 1921, to the first day of December, 1925, as an employee for the purpose of planting, cultivating and harvesting crops to be grown on owner's land above described, under the following terms and conditions:" (Transcript, folio 9).

Here, while it is stated that the owner wishes to "employ" cropper, there is definitely fixed a period of four years, which period is a very important element in this case. One of the incidents to an interest in real property as distinguished from a mere "employment" as a cropper is a term such as a lessee has. As distinguished from such a term, a mere employee is more commonly employed to cultivate and harvest some one crop, after which his employment ceases.

Then follows this most important term of the contract:

"Owner agrees

No Interference by Owner.

A. To employ cropper and not to interfere with him in the planting, cultivating and harvesting of the crop in any way, and to protect cropper during the existence of this contract against interference by any person whatsoever, the general possession of the land above described being reserved to owner." (Transcript, folio 9.)

The obvious purpose of including the provision "the general possession of the land above described being reserved to owner," is to negative the idea of the cropper having any interest in the land. An ordinary employer has general possession. A lessee on the other hand would have general possession. It is here attempted by this use of language to support an argument that the owner having possession the cropper must be nothing more than an employee. But this can not be done by the mere recital that general possession is in the owner. We must read the contract as a whole, and the important language in this contract, so far as we have thus far quoted therefrom, is what immediately precedes this language as to general possession. This preceding language controls as to the real intention of the parties, and it is that intention which must govern, irrespective of any other expressions contained in the contract. The owner, it is stated, shall not interfere with the cropper in the planting, cultivating and harvesting of the crop, in any way, and he will protect the cropper during the existence of this contract against interference by any person whatsoever. No lessee can claim a greater right in land than this right thus given. This, in fact, is a covenant of quiet enjoyment.

The contract proceeds with reference to what the owner agrees to, as follows:

> "Owner Hauls Crop to Delivery Point.
>
> D. To haul the said crop when properly prepared by cropper for hauling and shipping, to the packing house or nearby station."
>
> "Cropper no Interest in Land.
>
> E. To permit the cropper to work the land upon the conditions herein set forth, provided that the cropper shall have no interest or estate whatsoever in the land described herein." (Transcript, folio 10.)

Here again an attempt is made by the use of this last quoted language to support an argument that the contract amounts to no more than one of employment. We are not, however, restricted to the use of any language in the contract. The mere stating that the cropper shall have no interest or estate whatsoever in the land is of no effect, if in fact a reading of the contract as a whole shows that the cropper has some interest in the land. We are here referring particularly to such an interest from the standpoint of the state in its sovereign capacity of controlling the agricultural lands of the state. We are not primarily concerned with the relations between the cropper and the land owner or their relations to third parties, such as creditors. We shall later point out that it is with reference to such relationship that the law of landlord and tenant has been developed. We shall also point out that we are

here approaching a new subject, to wit, the interest of the state in the control of the dominion, enjoyment and possession of its agricultural lands, and that with reference to such interest of the state, the cropper in this case most decidedly has an interest in the land which the state has prohibited to him.

In "permitting the cropper to work the land upon the conditions herein set forth," the land owner does transfer a real interest in this land to the cropper, so far as the state's policy as enunciated in the alien land act is concerned.

The contract continues as to the owner's agreement:

> "Cropper's Compensation to be a Percentage of Crop Grown.
>
> F. To give to cropper fifty (50%) per cent of all crops grown on the above described land during the period of this agreement, as compensation for the services and labor of the cropper, as herein set forth." (Transcript, folio 10.)

Here the parties refer to the 50% of the crop to be retained by the cropper as "compensation for the services and labor of the cropper." It makes no difference, however, what they call this share of the crop to be retained by the cropper. The question is, does this interest that accrues in the shape of the product of the soil resulting from the cultivation thereof by the cropper amount to an interest in the land which is prohibited by the state statute?

The contract continues as to the owner's agreement:

"The Cropper's Right to Remove Share of Crop from the Land.

G. To grant to the cropper his right to a division of the crop after it is harvested and before its removal from the land, provided that the cropper exercises his option thereunto, and in the event of the exercise of such option, to grant to cropper the right to remove from the land his share of the crops within a reasonable time, even though said time should extend beyond the term of cropper's employment as herein provided for." (Transcript, folio 10.)

No lessee could have a more tangible interest in land than is here granted to this cropper, to divide the product of the soil and to have the right to remove the same from the land within a reasonable time even though the said time should extend beyond the end of the four year term granted by this contract.

The owner again agrees as follows:

"Cropper's Right to Employ Others with Right of Ingress and Egress.

H. To grant to the cropper the right to carry out the terms of this agreement by employing such agents or employees as he shall see fit, and to give to such agents or employees free ingress or egress from said property, or the right to live thereon, without let or hindrance." (Transcript, folio 10.)

No lessee ever had a greater right of absolutely controlling the method and manner of cultivating the soil and harvesting the crop than is here given by reason of the cropper's control over his own employees.

The contract continues to provide what the cropper agrees to do. First he agrees:

> "Specification of Crops to be Grown.
>
> I. After the execution and delivery of this agreement and at the proper time to plant, cultivate, and harvest the following specified crops: Strawberries, raspberries, loganberries and vegetables in a good and farmerlike manner." (Transcript, folio 11.)

It is to be noted that the cropper is given discretion as to any crops to be planted and that no such discretion is given to the owner with the exception of the particular crops above specified.

The cropper again agrees as follows:

> "Cropper to Maintain Personal Property and Return Same.
>
> J. To maintain and keep up the personal property and to return to owner at the termination of this agreement, all farming tools, implements, tractors, horses and all other personal property of every kind and character, the use of which is herein granted, in as good condition as they were when delivered to cropper, reasonable wear and tear thereof excepted." (Transcript, folio 11.)

This is similar to usual covenants on the part of lessees to return property to the lessor in as good a

condition as at the beginning of the lease, reasonable wear and tear thereof excepted.

The cropper again agrees as follows:

"Irrigation Ditches to be Maintained.

K. To keep the banks and bottoms of irrigation ditches on, adjacent to, and tributary to said land, free from weeds and foul growths; to repair and maintain all levees; to prevent losses of irrigation water, and in particular to prevent the overflow thereof into driveways and roads and to guard against fires of all kinds." (Transcript, folio 11.)

This agreement is characteristic of an ordinary lessee's obligations.

The cropper again agrees:

"Harvesting and Preparation of Crops for Shipment.

L. To harvest all crops when ripe, to pack the same in accordance with best standards, to prepare the same for shipping or transportation if necessary." (Transcript, folio 11.)

This would be the usual and proper condition to include in a lease where the agreement provided in terms that it was a lease and that the lessee would pay "rent" to his landlord in the form of a division of the crop.

The contract continues:

"Owner's Right to Terminate Contract on Sale of Land and Payment to be Made Cropper in That Event.

It is mutually understood and agreed by the parties hereto that in case of the land being sold, during the term of this agreement, the owner shall

have the option to terminate this agreement by paying to cropper for his own services at the rate of $100 per month from the beginning of the calendar year in which this agreement is to be terminated, together with all money expended or incurred by said cropper for and on account of labor and materials furnished for the planting and cultivation of the crop or crops then growing on the land, with interest at the rate of seven (7%) per cent per annum, or allow cropper to harvest the crop or crops then growing thereon." (Transcript, folio 12.)

This agreement that the owner may terminate the contract and compensate the cropper for his loss thereby resulting is the usual covenant which we find in leases where the landlord reserves the right to terminate.

The contract continues as follows:

"Damages to be Paid by Owner to Cropper on Breach of Contract by Owner.

It is further mutually understood and agreed by the parties hereto that in case of any breach of this contract on the part of owner or in case of any hindrance with or prevention of farming upon said or any part of said land owner agrees to pay to cropper, within thirty days of the date of such breach, all moneys expended or incurred by cropper for the planting and cultivation of the then growing crop or crops, and in addition thereto a sum equivalent to twenty per cent of such total amount so expended or incurred by cropper, as his liquidated damages for the cancellation of this agreement, provided, however, that cropper,

at the date of such breach, shall have fully kept and performed all the covenants by him to be performed under this agreement." (Transcript, folio 12.)

The condition just preceding this provides for a right to terminate the lease by sale and for the measure of damages to be paid to the cropper in the event of such a termination.

The last quoted provision provides for the measure of damages in the event that the land owner terminates the contract in any other way. Such a condition may very properly be included within a lease. The land owner may lease his land for four years and reserve in the lease the right to terminate the same and the parties expressly agree as to the measure of damages in the event of such termination.

This last quoted provision does not affirmatively state that the "owner may dispossess the cropper." It is stated that "in case of any breach of this contract on the part of the owner" certain liquidated damages must be paid. We might well ask whether equity would permit of these concluding clauses of the contract being so enforced as to do irreparable injury to the tenant. In the event of the cropper assuming obligations and placing himself in a position where the fixed liquidated damages would not compensate for actual damages suffered, would equity permit of these concluding clauses of the contract being so enforced as to do irreparable injury to the cropper?

It might be urged by the cropper in the event of such attempted termination, that the contract taken as a whole may be properly construed as giving to him the right to actually possess for the entire four year period, and particularly might such an argument be made if the cropper could show irreparable injury.

The issue presented to the court is whether the interest of the cropper as described in the language above quoted amounts, from the standpoint of the State of California rather than from the standpoint of either the land owner or the cropper, to such an interest in, "possession" of or "enjoyment" of the real property as to come within the prohibition of the state statute.

II.

THE LAW OF LANDLORD AND TENANT AND THE DISTINCTION DRAWN BY THE COURTS BETWEEN THE TITLE OF A LESSEE AND THE MERE RIGHT TO COMPENSATION OF A CROPPER HAS DEVELOPED IN CONSIDERATION OF THE MUTUAL RIGHTS OF THE PARTIES TO THESE AGREEMENTS AND THE RIGHTS OF THIRD PARTIES OTHER THAN THE STATE. THE INTEREST OF THE STATE IN ITS CONTROL OF THE POSSESSION, DOMINION AND ENJOYMENT OF ITS LANDS HAS NEVER BEEN CONSIDERED IN CONNECTION WITH THIS DEVELOPMENT OF THE LAW.

We have made a painstaking effort to read every case in the books wherein the courts have dealt with crop contracts. We get no help from the common

law on landlord and tenant because crop contracts were unknown to the common law. They are a development of our American law and came into being in the early years of our government, particularly in the Southern states where contracts were entered into as for the growth of tobacco, the tobacco crop to be divided between the land owner and the cropper. In every case which we have read the question of title to the land or to the crops had to do with the relationship between the land owner and the cropper or between some third person, as a creditor, and either the land owner or the cropper. In no single case has the question of the cropper's interest in the land been discussed by the court from the standpoint of the rights of the sovereign state. These rules developed in the law of landlord and tenant were, of course, intended to be a guide to parties, either owner, or cropper, or employer, or employee, or third persons such as creditors loaning money to the owner or to the cropper or to the employer or to the employee. It was seen that the question of title in any of these parties must be fixed and determined so that they all might deal one with another with a clear understanding of what their mutual rights are. From such a viewpoint the courts have said that certain croppers have no interests in the lands, but no court has said that such croppers have not such an interest in the land that the state could interest itself in and prohibit.

We find certain fundamental tests laid down to distinguish a so-called "lessee" from a so-called "cropper."

A lessee pays "rent"; a cropper receives "compensation."

A lessee ordinarily has the property for a certain "term." A cropper ordinarily would only have a right to possession for such time as to produce and harvest a certain crop.

A lessee has what is called "general possession" of the land. A cropper is not considered to have such "general possession." The land owner has it.

A lessee has complete title to the crop before division. A cropper sometimes by express agreement has no title to the crop until division. In the absence of such express agreement some jurisdictions hold that the cropper is a tenant in common to the crop with the land owner, prior to division. In other jurisdictions it is held that in the absence of an agreement the title to the crop is in the land owner only, prior to division.

A lessee would generally be required to keep the premises in repair, etc. In the case of a cropping agreement the more usual undertaking would be for the owner of the land to keep the premises in repair.

These rules which have been thus established for the guidance of persons entering into these different agreements and also for the guidance of third parties, have been expressed in many cases of which we will now give some typical examples.

A cropper can not execute or create a lien on the crop before division in those jurisdictions where title to the crop is said to be in the land owner.

There can be no execution by a sheriff on a judgment against a cropper by seizing the crop prior to division, where by the agreement between the land owner and the cropper complete title to the crop was vested in the land owner until certain harvesting and other conditions had been complied with by the cropper.

Neither a cropper nor a land owner can maintain an action in detinue against the other, because in order to maintain such an action the plaintiff must have the right to immediate possession. So where by agreement or by the law of any particular state the cropper and the land owner were tenants in common to the crops, no such action in detinue could be maintained by the one against the other.

Some cases hold that a cropper has no such interest in the land as to entitle him to bring trespass against a third party.

In many cases the point involved was whether as between the owner and the cropper the relationship of landlord and tenant existed so as to permit a legal action of the one against the other, which could only be brought when this relationship of landlord and tenant existed. As an example: If a cropper desires to bring trespass against the land owner he must show legal possession and right thereto in him-

self. If the owner had the right to enter, the cropper could not bring such an action in trespass.

A defendant in a suit for rent by the land owner plead a superior title to the land in a prior lessee. This prior lessee was a crop contractor. It was held that under such a plea the crop contractor was not such a lessee as to permit this plea to avail the defendant.

Title to the crop may be in the owner of land until certain advances paid by the owner have been repaid by the cropper. This, of course, would render ineffective as against the land owner any assignment or mortgage of the crop by the cropper to a third person before these advances had been repaid. And similarly such an assignment or mortgage might be ineffective until final division of the crop.

A land owner as plaintiff may sue in trover for the crop converted by a third person, the cropper not having fulfilled his contract and the title of the crop therefore still being in the land owner.

A cropper with no title until division has no lien on the crop for fertilizing ingredients sold by him to the land owner and used on the land.

After a division of the crop the cropper has title to his share, and so the owner of the land could not bring trover for it.

A cropper is guilty of a criminal offense in unlawfully removing the crop before division, such taking being a larceny, robbery or other offense, according to the circumstances of the case.

A defendant is guilty of an assault and battery if he forcibly removes a cropper from the premises which cropper had the right to enter in order to grow a crop thereon.

A land owner may have such exclusive title to the crop until he is reimbursed for advancements as to justify him while collecting his advancements, on being assaulted by the cropper, in knocking him down, and may not therefor be held guilty of an assault and battery.

We are inclined to the view that the cropper in this case is sufficiently interested in the land, irrespective of the state's interest therein, to permit of his protecting himself by legal proceedings in the event of certain contingencies arising. As an example, we might assume that parties are threatening to destroy an irrigation ditch on this land while the land owner is in Europe. Would the tenant be in such a position of a mere employee as to bar him from bringing an action in his own name and for the benefit of himself and also the land owner to enjoin the threatened destruction?

However, the primary consideration is that the state in its paramount and sovereign right to declare the law of ownership, possession and enjoyment of its land is not interested in all of these questions between the land owner and the cropper and third parties. A cropper by reason of his agreement with the land owner or by reason of the law of the particular state where the land is located may have no such

title to the land as would permit of an execution being levied against the crop or the land on a judgment being obtained against the cropper. But, on the other hand, he might have, in the judgment of the state, such an interest in, possession of and dominion over the land by reason of that identical agreement as to defeat the state's policy in its sovereign control of the agricultural lands of the state. The state in exercising this sovereignty is not interested in the right of the cropper's judgment creditor to seize upon a crop before division. But the state is vitally interested in another question, which has never been presented to the courts in these many decisions. That is, the possession and enjoyment of its agricultural lands by such a cropper.

III.

THE STATE'S INTEREST IN THE DOMINION AND POSSESSION OF ITS AGRICULTURAL LANDS.

Fundamental to this entire discussion is the right which from the time of the Year Books of the common law has been recognized as existing in all states to control the ownership and possession of the land of the state. This law is based upon the first of all laws, the law of self preservation. It is this fundamental right to control ownership of and dominion over lands which will be discussed more particularly in the *Porterfield* brief. This right has been reserved throughout the years by all governments and is

recognized in the different treaties between governments.

In the first instance, the state has complete title. No one is entitled to acquire title or to inherit lands without the permission of the state. The state is sovereign and may fix the conditions on which, as between the state and in this case ineligible aliens, such aliens may acquire any interest in the lands of the state. California along with several of the western states has said that these ineligible aliens can not acquire any interest in agricultural lands, treaty rights being recognized in all instances. The people of California adopted this act having in mind not the relationship between an ineligible alien and a citizen land owner or the relationship between either of them and third parties. The state was considering only the relationship between the state itself and all of these parties, and solely from the standpoint of and for the benefit of the commonwealth. The law of landlord and tenant was developed not for the benefit of the state but solely to fix rules of conduct to guide the relationship between individuals.

A cropper can not convey title in a growing crop to a third person if the cropper has no title to the crop. A lessee can, subject to the land owner's right to his rent, which might be a division of the crop. But all of this relates only to the cropper, the lessee, the landlord, and the third person involved. It in no way affects the state's concern in an attempt to vest

in an ineligible alien an interest in land, by giving to the alien actual possession and enjoyment thereof.

The State of California is not concerned with the rights that the law of real property may or may not give to such a cropper to assign the growing crop. The state is interested in preventing such a cropper, if he be an alien ineligible to citizenship, actually enjoying the possession and dominion of the land.

From this standpoint the state considers an employing farmer to be one who in fact conducts a farm. He is the manager. Upon his skill, prudence and foresight primarily depends the output of the farm. He may employ an ineligible alien to work for him. He and the alien have that right under the United States constitution and under the treaty between the United States and the alien's country. This is the right to employ such labor to work out one's ideas as one may see fit.

But if the owner of the land gives the ineligible alien carte blanche; if he leaves to the so-called employee absolute discretion as to how he shall work, how long his hours shall be, what the conditions of that labor shall be, how the "employee" may employ his own family or other ineligible aliens under him, that is another question.

Here we would have practical dominion of the soil by this particular ineligible alien. His interests would demand that he cultivate the soil according to his own theories and impose thereon such living en-

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vironments as would be most conducive to his own advantage just as he would if he owned the land.

The influence, standard of living, agricultural ideas and economic theories of this alien would prevail. The knowledge of husbandry gained from this experience would redound to the benefit of this alien. In the case of regular "employment" the theories of the owner of the land would prevail and such an owner would be the gainer by reason of this experience.

The constitutional and treaty guarantees were never intended to permit of the legal refinements distinguishing a "lessee" and a "cropper" in their ordinary relationships, being urged when their relationship to the state is involved.

One important reason for the rule that we find in some states that a cropper has no interest in the land is to protect the owner of the land from the results that would follow, as a matter of law, if the arrangement is considered a lease, and complete title to the crop thus vested in the cropper as a lessee up to the time of the division of the crop.

As said by Chief Justice Beasley of the Court of Errors and Appeals of New Jersey in *Guest* vs. *Opdyke,* 31 N. J. L. 552, at 554:

> "Landlords are induced to put out their farms, in this mode, to tenants who are poor, relying, as they imagine, in the certainty that their share of the produce can not be diverted, nor in any wise encumbered. Whereas, if these agreements are complete leases, the title to the crops produced

vests in the occupier, and the landlord would have no claim upon them until a division should have been made, and then his share would come to him as a *reditus* or rent. Such is not the light in which the law regards this species of contracts. On the contrary the true construction is, that by virtue of such agreements the occupier becomes simply a tenant in common, with the other contracting party of the growing crop, and that this joint interest continues until it is severed by a division."

In *Caswell* vs. *Districh*, 15 Wend. (N. Y.) 379, the court decided that a crop agreement was not a lease, and so, there could be no suit brought for "rent."

At page 381 the court said:

"It is very material to the landlord, and no injury to the tenant, that this view of the contract should be maintained, unless otherwise clearly expressed, for then the landlord has an interest to the extent of his share in the crops. If it is deemed rent, the whole interest belongs to the tenant until a division. Where a farm is let for a year upon shares, the landlord looks to his interest in the crop as his security, and thereby is enabled to accommodate tenants, who otherwise would not be trusted for the rent."

Other cases hold against the theory of a lease so as to vest sufficient title to the crop in the owner of the land to permit of the owner joining as a plaintiff in actions brought to protect the crop. As we shall see, the rule established by the California Supreme Court permits of this joint interest in the crop with

an additional interest by the cropper in the land, that is, the interest of a lessee. None of the results that should be avoided need happen in California if in this case it is determined that the cropper has such an interest in the land as to violate the California Alien Land Act. The owner of the land, O'Brien, could claim by reason of his contract such an interest in the land and in the crop as would forbid his tenants assigning or encumbering the crop to the injury of O'Brien, and at the same time the rights of the state in its well defined policy of control over its agricultural lands might be upheld.

At common law title to the crop, the product of the soil, necessarily depended upon title to the soil itself. A lessee, having title to the soil during the term of his lease, also had title to the crop.

Crop contracts were not known to the common law. In America there has developed the history of crop contracts. In some states, in absence of an agreement to the contrary, the cropper and the land owner are tenants in common to the crop, though the title to the land is said to be in the land owner. This rule permits title in the product of the soil to be in one who is said to have no interest in the soil. In other states, where there is no agreement to the contrary, the entire title to the crop is said to be in the land owner. This follows the common law rule.

We shall see that the California rule is that even though the parties are tenants in common to the crop, the cropper may be said to have an interest in the land; that is, he may be a lessee.

In our case it is interesting to note that nothing is said in the cropping contract as to the title to the crop. It is agreed in one clause of the contract that title to the land shall remain in the land owner. This clause, however, must be read in connection with the entire contract and with the intention of the parties, as is clearly shown by a reading of the entire contract. If we assume that the title to the crop is in the land owner until division, this would result not from the fact that title to the land is in the land owner, but from the express agreement of the parties.

Such an agreement would be made in view of a body of law that has grown up to measure the rights between landlord and tenant and their rights as against third parties. This historical growth of the law has never recognized the other phase of the question with which we are here dealing. That other phase is the interest of the sovereign state in the actual conditions under which it will permit its agricultural lands to be cultivated and developed to fruition.

In *Johnson* vs. *Hoffman,* 53 Mo. 504, at 507, Judge Adams says:

> "Contracts of this character, although unknown in England, are frequent in the United States. The authorities, however, are conflicting in the several states, as to whether they create the relation of landlord and tenant, or simply

make them croppers on the shares. In my judgment no definite rule can be laid down on this subject. Each case must be determined by the words of the written agreement between the parties."

IV.

THE RULE ESTABLISHED BY THE CALIFORNIA SUPREME COURT, ON CROPPING CONTRACTS, IS THAT THE LAND OWNER AND THE CROPPER MAY BE TENANTS IN COMMON OF THE CROP AND AT THE SAME TIME THE CROPPER MAY HAVE AN INTEREST IN THE LAND. THIS IS A DIFFERENT RULE THAN THAT WHICH EXISTS IN SOME OTHER JURISDICTIONS.

The mere fact that a tenant is to receive compensation in the form of a share of the net proceeds from sale of the crops and that the owner has some title to the crop, as that of a tenant in common, does not in California prevent the tenant being considered as having an interest in the real property. The real test is the intention of the parties and such expressions as "lessee," "leasing," "letting," "renting," or, on the other hand, "employee," "employment," "general possession," etc., do not necessarily control.

In the case of *Bernal* vs. *Hovious,* 17 Cal. 541, the owner of the land made an agreement with A, calling it a lease; A was to possess the land for three years; the owner was to furnish farming implements, horses, wagons, etc.; A to work the land and give the owner for the use thereof one-third of the grain that was raised. It was held by the court that this agreement was not a lease, though it was called such, but that it

was a contract for working the farm upon shares and that the parties were tenants in common of the grain until the division was made.

The Supreme Court of this state, however, in *Walls* vs. *Preston,* 25 Cal. 60, at page 64, says, referring to the case of *Bernal* vs. *Hovious,* and also to the New York decisions, that:

> "In all the cases in New York affirming on this point *Putnam* vs. *Wise* (1 Hill 247), and in *Bernal* vs. *Hovious,* the question was merely who was entitled to the possession of the crop, not whether the owner or the occupant was in possession of the land, not whether the relation of landlord and tenant existed between the parties, though that question was incidentally discussed."

This case of *Walls* vs. *Preston* gives a very clear discussion by Mr. Justice Rhodes on the points involved as distinguishing between a lease interest and a mere crop agreement. The case held a certain contract to be a lease. The contract used the word "lease" but provided for a rental in the form of delivery to the owner of one-sixth of the crop. The court shows that it would disregard mere words and ascertain the real intent of the parties. It is particularly pointed out that the mere fact that rent is to be paid in the form of a division of the crop rather than in money will not prevent the parties from being considered as landlord and tenant. At pages 64, 65 and 66 the court says:

> "The two principles deducible from those cases are these: First—If the agreement contains

terms which by themselves would import a lease, and other terms which provide for a division of the crops, and it is doubtful which it is—a lease or a cropping contract—it will be deemed a cropping contract, by reason of a division of the crops; and second, where the agreement provides for a division of the crops between the owner and occupant, they are held to be tenants in common of the crop. It can not be maintained, upon those authorities, and certainly not upon principle, that a lease, in the usual form of a demise, *for a term of years, with covenants sufficient to give the lessee the exclusive possession of the land during the time, and to require him to yield up the possession at the end of that term, shall not be a lease, and the occupant shall not be a tenant, but shall be a mere servant of the owner, because the parties have made provisions for a division of some portion or all of the crops that may be produced.* The term division, as applied to the crops, has no more forcible signification in aid of the interpretation of the instrument than has the word demise, when employed in connection with the land.

Mr. Justice Cowen, in *Putnam* vs. *Wise,* cites with approbation, Woodfall (Land. and Ten.) who says that the most proper and authentic form of words may be overcome by a contrary intent appearing in the deed of demise. No reason can be assigned why the same rule of construction should not be applicable to the words providing for a division of the crop.

* * * * * * *

There it plainly appears that the parties have made a lease, the court will not declare it *not* to be

a lease *simply because the parties have inserted a covenant that more appropriately belongs to a contract* of a different character. In the cases we have cited, the courts were endeavoring to ascertain the intention of the parties; and having ascertained it, they declared the rights of the parties under the contract, as they made it, so far as the same were in issue.

There is certainly no rule of law so absolute in its nature as to prevent the occupant of land, under a contract which constitutes him a tenant in common with the owner in the crops, from having as entire a control over the premises during the term, if the parties so agree, as a tenant covenanting to pay a money rent would have. In other words, from being a tenant of the land under a lease, and at the same time a tenant in common of the crop, or of some part of it. Such agreements are constantly made, and it never occurs to the parties, and they do not intend, that the tenant is changed into a servant of the lessor, because the lessor receives a portion of all of his compensation for the use of the land in some uncertain quantity of the products of the land." (Italics ours.)

At page 66 the court indicates its disapproval of the New York cases in the following language:

"We can see nothing incompatible in the tenants of the land under a lease being at the same time a tenant in common of the crops; and there never would have been any doubt upon this point *had not the judges in New York, in passing*

upon questions concerning the rights of the parties to the possession of the crops uttered dicta which seemed to determine the point against the occupant." (Italics ours.)

At page 67 the court says:

"If a reservation of rent, or some benefit or recompense equivalent to rent, is deemed necessary, in order to constitute a contract a lease, the covenant to pay or deliver a portion of the crop, amounts in every sense to a recompense for the use and occupation of the land, as fully as would a covenant to pay money, or a certain amount of the crops, or to improve the premises, or keep them in repair, or to pay the taxes, or perform labor for the lessor, all of which have been held good as a reservation of rent."

* * * * * * *

"It clearly appears to us that the parties in this case intended to make a lease, and that the instrument executed by them was a lease; that its effect as such was not destroyed by their having contracted for the payment to the lessor of a portion of the specific crops to be produced, and that that covenant was an agreement to pay the rent of the premises out of the crops."

In *Clarke and Cain* vs. *Cobb,* 121 Cal. 595, the court held that a contract by which farming lands were demised and let for a term of years to one who agreed to give annually for the use thereof a certain portion of the crops of grain and other products grown thereon was a lease creating the conventional

relations of landlord and tenant and not a cropping contract.

At page 597 the court said:

"At the threshold of this investigation it becomes important to determine the legal status of the contracts entered into with Cobb by Clarke and his executors. That these contracts were leases, that the conventional relation of landlord and tenant existed between the parties, and that the grains and fruits to be delivered to the landlord when gathered and harvested were rent, we are entirely satisfied. Rent is a compensation paid for the use of land. *It need not be money. Any chattels or products of the soil serve the purpose equally as well. These contracts are in no sense cropping contracts. The single difference differentiating them from ordinary conventional leases is that the rent is to be paid in products of the soil, after harvest, rather than in money. But such difference is wholly immaterial, as changing the character and aspect of the instruments.*

It is substantially conceded that the landlord and tenant are not cotenants in the land, but it is claimed that they are cotenants in the crops to be raised. The authorities in this state recognize that such conditions may exist. (*Bernal* vs. *Hovious,* 17 Cal. 544; 79 Am. Dec. 147; *Walls* vs. *Preston,* 25 Cal. 59.) But we find no apt words here to disclose such a status. When it is established that a certain contract is a lease, and that the relation of landlord and tenant exists between the parties, there must be some appropriate

words in the contract to indicate that the crops raised on the lands are to be held in cotenancy or such will not be the conclusion reached. If there is nothing in the language to indicate that intention, then the products to be delivered to the landlord after harvest, by the tenant, will be deemed the property of the tenant until that time, and treated as rent to be then paid." (Italics ours.)

At page 598 the court, in discussing the above California cases of *Walls* vs. *Preston* and *Bernal* vs. *Hovious,* and also the New York decisions, said:

"In *Walls* vs. *Preston, supra, Bernal* vs. *Hovious, supra,* and the New York authorities upon which it is based, are reviewed and explained, and the doctrine of the *Bernal* case limited. In *Walls* vs. *Preston, supra,* the facts were entirely similar to those found in this record, and after a careful consideration of the principles involved the court said: 'It clearly appears to us that the parties in this case intended to make a lease, and that the instrument executed by them was a lease; that its effect as such was not destroyed by their having contracted for the payment to the lessor of a portion of the specific crops to be produced, and that that covenant was an agreement to pay the rent of the premises out of the crops.' "

In *Knox* vs. *Marshall,* 19 Cal. 617, just as in the case of *Bernal* vs. *Hovious,* the only question involved was whether the owner and the party working the land were *tenants in common of the hay and grain that was grown.* As is pointed out in the California cases there may be the relation of landlord

and tenant and at the same time the landlord and tenant be tenants in common with reference to the grain that is grown.

In *Smith* vs. *Schultz*, 89 Cal. 526, a written contract purported to be a lease of land for a specified term. The lessee was to plant crops, certain shares of the crops were to be delivered to the lessor, the lessor was to have the right of re-entry in case of default on the part of the lessee, otherwise the lessee was to hold for a definite term. This was held to be a lease and not a partnership.

It is to be noted that there is a definite term of four years fixed in the crop agreement in the case at bar.

The ordinary relationship of landlord and tenant is where A leases land from B and A has complete title to the crops grown thereon and he pays rent to B in the form of money.

If we have A in possession of the land and not owning the crop but merely having a part interest therein along with B, this is a variation and departure from the ordinary relationship of landlord and tenant. Then there arose the question in California, does the fact that A does not own all the crop negative the idea that he is a lessee? The California Supreme Court has answered this question in the negative. That court has criticised the New York decisions which determined that in such a case the parties were cotenants in the crop (a proper deter-

mination) and then continue to state in dicta unnecessary to the decision, that A had no interest in the land and that therefore he was not a lessee. The California court has said that the question of whether the arrangement is a lease in no way depends upon the interests of the land owner and the cropper in the crops. We have seen that in the contract now before the court nothing is said as to who has title to the crop. The contract might well be construed to mean that the land owner and the cropper are tenants in common to the crop. Let us assume, however, that there was an express condition, as indeed there might be in some other cropping contract, to the effect that until division of the crop title to the crop is in the land owner.

We would then go one step further than in the cases which have been decided by the California Supreme Court. Instead of A having only a part interest in the crop he would have no legal title thereto until division. On division he would be entitled to one-half of the crop. This is but a further step toward taking from A an interest in the crop. But the identical conclusion of the California Supreme Court would logically follow. That is, it could not be argued that A is not a lessee merely because legal title to the entire land and crop is in B, any more than the same argument could be made when A had a one-half undivided interest in the crop, the other undivided one-half interest being in the land owner.

The important thing from the standpoint of the state is, irrespective of their agreement as to the legal refinements in the matter of title, A in fact would have a real interest in this product of the soil. Let us assume in our case that just prior to a division the entire crop harvested and ready for division is destroyed by lightning. Neither party would be at fault. Could the cropper make any claim against the land owner for compensation on account of his services as an "employee"? We respectfully submit that it is obvious that he could make no such claim. His remuneration was to come from a division of the crop. The crop has been destroyed by lightning. It is his loss just as it is the land owner's loss. Here we have a real test to show that irrespective of anything that is said in the contract about his being an "employee" and his receiving "compensation" and the title to the land at all times being in the land owner, there is a real tangible interest in this land vesting in the cropper. He cannot be properly described as a mere employee. He has such an interest in the land as to permit of the state's land policy declaring that if he be an alien ineligible to citizenship this cropping contract is prohibited by law.

If A would be paying "rent" by yielding unto B one-half of the crop instead of a stated sum of money, he would also be paying rent if he yielded unto B all of the crop.

And again, A would nevertheless be paying rent if he agreed that complete title to the crop should be in

B until a division and that at such division one-half of the crop would be given over unto A. What difference, so far as the state's land policy is concerned, is there between A retaining title to the crop and paying a fixed sum of money as rent and his yielding entire title to the crop until division and then receiving from B one-half of the crop?

See *Moulton* vs. *Robinson,* 27 N. H. 550, for the point that the mere fact that the land owner and the tenant are tenants in common to the crop does not destroy the relationship of landlord and tenant.

In *Warner* vs. *Abbey,* 112 Mass. 355, it was held that under all the circumstances of that case the parties intended that the cropper was to have title to the crop before division.

What real difference is there between a land owner letting land to a cropper and receiving part of the crops *as rent* and the identical relationship between them only the cropper is to receive one-half of the crop *as compensation*? The situation is that in the first arrangement the land owner receives "rent" so-called and in the second arrangement the cropper receives "compensation" so-called. But this distinction means nothing to the state in its efforts to control possession, enjoyment and dominion over its agricultural lands.

The construction by the California Supreme Court as to the relations existing between a land owner and a cropper should, we submit, be most persuasive with this court in construing the California statute.

V.

ADDITIONAL AUTHORITIES FROM STATES OTHER THAN CALIFORNIA, IN THE MATTER OF CROP AGREEMENTS.

Ferris vs. *Hoaglund,* 25 Southern 834 (Alabama Supreme Court). A crop agreement gave to so-called "lessee" right to cultivate a vineyard—in a certain way—and take a reasonable compensation from the sales proceeds of the crop, and return balance of proceeds to owner. Held, that this is mere employment—and not a lease. Also held that even though "lessee" did not cultivate as per his agreement, he was so entitled to possess, and that therefore proper remedy was to have contract canceled. And so this case holds that even such an employee has sufficient lawful interest in the land to prevent trespass lying.

At page 836 the court said:

> "But, so far as it affects the question of trespass, the result is the same. The contract remained in force, there being no rescission by the parties. It not only conferred the right, but imposed the duty, upon defendant to enter upon the land in the execution of the work of gathering the crop as well as of cultivation. It gave a license to defendant to so enter, which being granted upon a valuable consideration, was not revocable so as to destroy his right to collect from the crop after it had ripened, and so as to cause a failure in the performance of his obligation to gather and market same. The doctrine of

estoppel *in pais* applies in such case. *Thodes* vs. *Otis,* 33 App. 496. For the purpose of restraining a trespass the bill is without equity, but, if it sufficiently shows a right in complainants to cancel or rescind the contract, it may stand for relief in that aspect. When the remedy for recovery of damages at law is adequate, equity may decree the cancellation of a contract, at the instance of a party who has substantially complied with it, for its nonperformance by the other party, and where the parties can be placed substantially *in statu quo.*"

In *Dixon* vs. *Niccolls,* 89 A. D. 312 (Ill.) the tenant had exclusive possession of the premises, with agreement he to pay rent in form of a portion of the crop, to be delivered to owner after it was threshed. Held, relation of landlord and tenant existed. Tenant was Brodrick, owner was Knoop. At page 316 the court says:

"But in all cases, whether it is simply raising a crop on joint account or a tenancy, the rent payable in kind depends upon the intention of the parties.

In this case there can be no misconception on that point. The exclusive possession of the farm for a series of years by Brodrick, a rent agreed upon, and the nonresidence of Knoop, the owner, all conspire to show the relation of landlord and tenant, and thereby constituting Brodrick the exclusive owner of the crop until the stipulated rent was set apart or paid to the landlord. It is not like any one of the cases cited by

the plaintiff in error. In all of them, facts are disclosed going to show the intention that there should exist a joint ownership in the crop to be raised, and not a tenancy at a stipulated rent."

In some of those jurisdictions holding that in the absence of an agreement on the subject, the land owner and tenant are tenants in common to the crop, it has also been held that even though there be an express agreement that title to the crop is in the land owner until division, this amounts to nothing more than a chattel mortgage executed by the cropper for the security of the land owner.

See *McNeal* vs. *Ryder,* 81 N. W. 830 (Supreme Court of Minnesota).

And what would this same court say if asked as to the interest of the cropper where the only question involved was the rights of the sovereign state in its control over the cultivation and dominion of its agricultural lands?

The Minnesota Supreme Court has also decided that the mere recital in a cropper's agreement that the land owner shall have title to the crop until division does not warrant an action by him against the cropper, prior to division, to recover possession of all of the crops where the cropper has not defaulted in his contract. *Strangeway* vs. *Einsenman,* 71 N. W. 617.

The contract in that case provided "until such division" (of the crop) "the title and possession of

all crops and stock on the premises to be and remain in the plaintiff" (the land owner).

And in consideration of the cropper's performance of all the terms of the contract to be by him performed, the plaintiff upon reasonable request thereafter made was to give and deliver to the defendant one-half of all grain, hay and other crops raised on the farm each year.

At pages 618 and 619 the Minnesota Supreme Court said:

> "In brief, there was, under the evidence, no provision in the contract which entitled the plaintiff to the possession of the property, unless it was the one that until division 'the title and possession' should be and remain in him.
>
> The cases are in hopeless conflict as to the construction of contracts between the owner and occupier of land for its cultivation on shares, and as to the rights of the respective parties in the land and in the crops. We have no intention of going into any extended consideration of the subject or the cases. Those who wish to do so will find a quite full collection of the cases and discussion of the subject in the notes to the leading case of *Putnam* vs. *Wise,* 37 Am. Dec. 309. See, also, Freem. Co-Ten. Sec. 100. No general rule can be laid down, applicable to all cases of agreements of this kind, because the precise nature of the interest or title between the contracting parties is largely a question of their intention, as expressed in the language they have used, and hence must depend upon the particular provisions of

the contract itself. But it may be stated generally that the present tendency of the authorities is to hold that whenever there is a provision, in whatever form, for dividing the specific products of the premises, a tenancy in common arises in the products which are to be divided. As applied to most agreements for the cultivation of land on shares, this view is much more in accordance with the actual intention as well as interest of both parties than to hold that either the owner or occupier of the land is the exclusive owner of the crops before division, and merely the debtor or creditor of the other for rent or wages. Taking the present contract by its four corners, and considering all its provisions together, we are satisfied that its true construction is that, whatever may have been the relation of the parties as to the land, they were tenants in common of the crops before division, and that, so long as defendant kept and performed all the terms of the contract, he was entitled to the possession and control of the crops for the purpose of performing upon them the labor in the way of harvesting, threshing, etc., which he had a right to do, and was required to do by the terms of his agreement. The provision that until division the title and possession should be and remain in the plaintiff, if given the effect claimed for it by him, would be as repugnant to both the letter and spirit of the other provisions in the contract as would be a provision that defendant should have no right to enter upon the premises at all, and that, if he did so, he would be a trespasser. The only effect that can be given to that provision consistent with the general purpose, as well as the other express provisions, of

the contract, is that plaintiff should have the title, and when necessary, the right to the possession of the crops, as security for performance of the terms of the contract by the defendant. Any other construction would nullify the entire contract, and render impossible its performance by the defendant."

VI.

CONCLUSION.

When the people of California used the very sweeping language forbidding an ineligible alien to "*acquire, possess, enjoy* and *transfer* real property, or any interest therein, in this state," except as permitted by treaty, they certainly intended to prevent such aliens controlling great tracts of agricultural lands in this state by the mere device of cropping contracts. It was the possession and enjoyment and occupancy of these agricultural lands by these ineligible aliens of another race in competition with our own citizens which the people attempted to make impossible. It was not the acquirement of title in fee alone that this legislation was designed to prevent. It was intended to withhold from ineligible aliens all of the advantages which the ownership of agricultural lands gives. It was intended to withhold from them dominion, occupancy, possession, enjoyment. It was intended to prevent ineligible aliens from having that use, that control, of agricultural lands which would give to them in whole or in part the fruits thereof. It was

intended to free the American farmer from the competition, upon American soil, of the Oriental farmer. The act was drawn by those who know and in recognition of the established fact that the American farmer can not live in competition with the Oriental farmer. It was drawn by those who know and in recognition of the established fact that the American farm which is in competition with the Oriental farm will cease to be cultivated, or will be cultivated by Orientals. It was to save the American farmer and the American farm laborer from the competition of unlimited hordes of labor of the Oriental; indeed, from the competition of the labor of wives, widows and children. The act was designed to protect the American home life from the competition of the Oriental home life. The American farm home, which is our country's boast, will not long endure if the Oriental farm home is to become its competitor. The members of the American farm home can not continue the activities which now ennoble farm life if such home and such activities are to be sustained against Oriental habits and customs. Wife and daughter can not confine their activities to keeping the home; the children of suitable age can not be kept in schools, with father and son in the hopeless struggle of tilling the farm in competition with all the members of a family of an Oriental engaged in the same labor.

The labor of the Oriental paid for by fixed compensation as wages is not destructive. The labor of

the Oriental when the compensation is to be increased by Oriental habit and custom is destructive. The American farm was not builded upon the idea of wives and daughters tilling the soil.

This act was designed to protect the farm as it now exists in California and elsewhere in the agricultural areas of the United States. The destruction of our farm life is not the more desirable because destroyed by a horde of Orientals whose signatures have been attached to cropping contracts, rather than by the same people holding the title in fee. It is the destruction of the farm life that is to be prevented and not the method of its destruction.

A word description often fails, as here it may fail, to produce an actual picture of a physical condition. Though the physical condition exists, one who has looked upon it always finds language inadequate to accurately portray the condition to one who has not actually observed it, and one who has actually observed the condition does not need the word description.

The condition we are attempting to describe may be readily seen by any one who will travel any state highway through any of the richest agricultural districts of California. We respectfully urge that the court ignore the surface veneering and strike at the substance of a structure of Oriental agricultural development in California which is well on its way to a considerable growth, after a loudly acclaimed birth. Printed forms of these cropping contracts are

being distributed throughout the state; legal advice is being extensively given to ineligible Orientals encouraging them in this evasion of the real purposes of our California Alien Land Act.

The fundamental consideration must be, as has been determined by federal and state courts, that there is reserved to all the states the absolute control of any and every character of real interest in the agricultural lands of the state. Upon this principle rests the safety of our form of government.

The principle, well established in the law, that permits the State of California to prohibit ineligible aliens from acquiring fee simple title to agricultural lands, must also, in all reason and logic, permit of our prohibiting the same class of individuals from securing in such lands that interest, dominion, enjoyment and possession thereof and of the fruits thereof which these cropping contracts lead to.

This is no time, we respectfully submit, for nice refinements such as have been suggested, in statutory construction and in the assumed distinction between "employment" and the enjoyment of a real interest in agricultural lands and the produce of such lands.

We respectfully point out to the court that Section 717 of the Civil Code of California limits a lease of land for agricultural purposes, in which shall be reserved any rent or service of any kind, to a period of fifteen years. This section reads:

> "No lease or grant of land for agricultural or horticultural purposes for a longer period than

fifteen years, in which shall be reserved any rent or service of any kind, shall be valid; provided, that any land of a municipality used for agricultural or horticultural purposes and upon which is discharged sewage or waste water may be leased for a period not exceeding twenty-five years."

If ineligible aliens may possess the agricultural lands of California for indefinite periods of time through the means of such cropping agreements as are involved in the case at bar, such ineligible aliens would be in a far better position to circumvent the purposes of the California statute than would be the case if they were expressly permitted to lease our lands for periods of fifteen years. Our Alien Land Law would thus be held to be useless to accomplish the real and the vital purpose of the people of our state.

It is a fundamental rule that contracts "affecting the public interest" are to be construed liberally in favor of the public.

Williston, in his work on contracts, Vol. 2, Sec. 689, states:

> "It will be observed that this rule is based on a different reason from the ordinary rules of interpretation. There is no reason to suppose that the parties in fact intended to favor the public, and when the court so assumes it does so because it is for the public interests so to assume."

In the last analysis the rights of the subjects and citizens of two great nations which have been fixed

and determined by those nations in a solemn treaty are involved in this case. For the reason that it is perfectly obvious that the crop contract in question was prepared with the view of avoiding the treaty limitations, we respectfully submit that public interest demands that this contract be construed as a violation of the California Alien Land Law. The treaty and the California law, read together, are harmonious and are declarative of a broad public policy, prohibiting the subjects of either country from entering into the possession and control of any lands in the other except for the purposes specified, to wit, commercial and residential purposes, as permitted by the treaty.

The California Alien Land Law of 1920 expressly recognizes all rights guaranteed to the nationals of the respective countries by the United States-Japan treaty of February 21, 1911. A reading of the said treaty therefore will assist us in understanding what the California act attempts to prohibit. There is nothing in the treaty granting any right to the subjects of either of these two countries to enjoy or possess agricultural lands in the other country. The treaty strictly limits these rights, so far as interest in lands or buildings is concerned, to the use of these lands or buildings for commercial or residential purposes.

Article I of the treaty grants to the citizens or subjects of each of the high contracting parties "liberty to enter, travel and reside in the territories

of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

The California Alien Land Act prohibits, except as permitted by this treaty, the creation of any interest in California land for the benefit of ineligible aliens. Neither country intended that the other should have any rights of occupation of lands except for commercial or residential purposes. The proposed occupancy of the land in this case is for an entirely different purpose, to wit: for agricultural and horticultural purposes, which is prohibited by the California Alien Land Law.

We particularly call the court's attention to the concurring opinion of Judge Bledsoe in this case. (Transcript, folios 48 and following.) Judge Bledsoe presents our theories with considerable force. We follow his logic until the final paragraph of his opinion wherein Judge Bledsoe decides that the mere expression in the contract "provided that the cropper shall have no interest or estate whatsoever in the land described herein" controls over all the other clearly expressed provisions of this cropping contract. We are anxious to impress upon the court our position that the mere phraseology quoted by

Judge Bledsoe from the cropping contract should not have persuaded him to a construction which was not supported by the terms of the contract when read in their entirety. The mere statement that the cropper was to have no interest in the land should not, in our judgment, control over the positive provisions of the contract which did, in fact, give to the cropper an interest in real property. There are many cases deciding that where copartners declare in a written instrument that it is not their intention to be partners the courts will nevertheless hold them to have entered into a copartnership if the general legal effect of the other language in the contract requires such a construction.

If ineligible aliens may be given possession and enjoyment of agricultural lands and then seek protection in such phraseology as is referred to by Judge Bledsoe, it is useless for the western states to attempt to control a situation which is of the gravest importance to the welfare of the people of these states.

The court is called upon to construe a new act, an act without antecedent, and drafted to meet a new condition. In its construction the court is not led or restrained by precedent. The books may help, but the daily life about us furnishes the true guide. The facts with which this statute deals have not

heretofore been met with in judicial or legislative history.

Justice Crane of the New York Court of Appeals recently stated:

> "The two sources of the law are to be found, first, in the books and, second, in the life about us."

The reason for this law is found in the life about us, and a consideration of the facts which impelled its enactment is indispensable to its proper construction.

The language found in judicial expressions should not be given application to facts and conditions different from those in reference to which such language was used. We contend for no change in the law. We ask only that it be properly applied to new facts and new conditions.

This thought was recently expressed by Justice Holmes in reference to the constitution, as follows:

> "Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding year."

And so in this case. The rules of landlord and tenant and of employer and employee do not change, but as "the habits of life of the people vary with each succeeding year," so we must not attempt to apply such rules to these changing conditions without realizing the controlling circumstances which brought about the original judicial expressions.

A metropolitan newspaper referred to Justice Clarke, upon his retirement from the United States Supreme Court, as "one of its strongest minds and most liberal and democratic spirits—recognizing the law less as a rule of applying antiquated cases to present conditions than as a human and therefore a progressive institution keeping pace with humanity's growing and changing needs."

With this conception of the law, we respectfully submit this case.

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APPENDIX.

Exhibit A.

CALIFORNIA ALIEN LAND LAW OF 1920.

(Statutes of California, 1921, page lxxxiii.)

An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith.

The people of the State of California do enact as follows:

Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

Sec. 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent, and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

Sec. 3. Any company, association or corporation organized under the laws of this or any other state or nation, of which a majority of the members are aliens other than those specified in section one of this act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy and convey real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed

by any treaty now existing between the government of the United States and the nation or country of which such members or stockholders are citizens or subjects, and not otherwise. Hereafter all aliens other than those specified in section one hereof may become members of or acquire shares of stock in any company, association or corporation that is or may be authorized to acquire, possess, enjoy or convey agricultural land, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

Sec. 4. Hereafter no alien mentioned in section two hereof and no company, association or corporation mentioned in section three hereof, may be appointed guardian of that portion of the estate of a minor which consists of property which such alien or such company, association or corporation is inhibited from acquiring, possessing, enjoying or transferring by reason of the provisions of this act. The public administrator of the proper county, or any other competent person or corporation, may be appointed guardian of the estate of a minor citizen whose parents are ineligible to appointment under the provisions of this section.

On such notice to the guardian as the court may require, the superior court may remove the guardian of such an estate whenever it appears to the satisfaction of the court:

(a) That the guardian has failed to file the report required by the provisions of section five hereof; or

(b) That the property of the ward has not been or is not being administered with due regard to the primary interest of the ward; or

(c) That facts exist which would make the guardian ineligible to appointment in the first instance; or

(d) That facts establishing any other legal ground for removal exist.

Sec. 5. (a) The term "trustee" as used in this section means any person, company, association or corporation that as guardian, trustee, attorney-in-fact or agent, or in any other capacity has the title, custody or control of property, or some interest therein, belonging to an alien mentioned in section two hereof, or to the minor child of such an alien, if the property is of such

a character that such alien is inhibited from acquiring, possessing, enjoying or transferring it.

(b) Annually on or before the thirty-first day of January every such trustee must file in the office of the secretary of state of California and in the office of the county clerk of each county in which any of the property is situated, a verified written report showing:

(1) The property, real or personal, held by him for or on behalf of such alien or minor;

(2) A statement showing the date when each item of such property came into his possession or control;

(3) An itemized account of all expenditures, investments, rents, issues and profits in respect to the administration and control of such property with particular reference to holdings of corporate stock and leases, cropping contracts and other agreements in respect to land and the handling or sale of products thereof.

(c) Any person, company, association or corporation that violates any provision of this section is guilty of a misdemeanor and shall be punished by a fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

(d) The provisions of this section are cumulative and are not intended to change the jurisdiction or the rules of practice of courts of justice.

Sec. 6. Whenever it appears to the court in any probate proceeding that by reason of the provisions of this act any heir or devisee can not take real property in this state or membership or shares of stock in a company, association or corporation which, but for said provisions, said heir or devisee would take as such, the court, instead of ordering a distribution of such property to such heir or devisee, shall order a sale of said property to be made in the manner provided by law for probate sales of property and the proceeds of such sale shall be distributed to such heir or devisee in lieu of such property.

Sec. 7. Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association or corporation mentioned in section three of this act, shall escheat to, and become and remain the property of the State of California.

The attorney general or district attorney of the proper county shall institute proceedings to have the escheat of such real property adjudged and enforced in the manner provided by section four hundred seventy-four of the Political Code and title eight, part three of the Code of Civil Procedure. Upon the entry of final judgment in such proceedings, the title to such real property shall pass to the State of California. The provisions of this section and of sections two and three of this act shall not apply to any real property hereafter acquired in the enforcement or in satisfaction of any lien now existing upon, or interest in such property, so long as such real property so acquired shall remain the property of the alien, company, association or corporation acquiring the same in such manner. No alien, company, association or corporation mentioned in section two or section three hereof shall hold for a longer period than two years the possession of any agricultural land acquired in the enforcement of or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure a debt.

Sec. 8. Any leasehold or other interest in real property less than the fee, hereafter acquired in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association or corporation mentioned in section three of this act, shall escheat to the State of California. The attorney general or district attorney of the proper county shall institute proceedings to have such escheat adjudged and enforced as provided in section seven of this act. In such proceedings the court shall determine and adjudge the value of such leasehold or other interest in such real property, and enter judgment for the state for the amount thereof together with costs. Thereupon the court shall order a sale of the real property covered by such leasehold, or other interest, in the manner provided by section twelve hundred seventy-one of the Code of Civil Procedure. Out of the proceeds arising from such sale, the amount of the judgment rendered for the state shall be paid into the state treasury and the balance shall be deposited with and distributed by the court in accordance with the interest of the parties therein. Any share of stock or the interest of any member in a company, association or corporation hereafter acquired in violation of the provisions of section three of this act shall escheat to the State of California. Such escheat shall

be adjudged and enforced in the same manner as provided in this section for the escheat of a leasehold or other interest in real property less than the fee.

Sec. 9. Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state if the property interest involved is of such a character that an alien mentioned in section two hereof is inhibited from acquiring, possessing, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein.

A prima facie presumption that the conveyance is made with such intent shall arise upon proof of any of the following groups of facts:

(a) The taking of the property in the name of a person other than the persons mentioned in section two hereof if the consideration is paid or agreed or understood to be paid by an alien mentioned in section two hereof;

(b) The taking of the property in the name of a company, association or corporation, if the memberships or shares of stock therein held by aliens mentioned in section two hereof, together with the memberships or shares of stock held by others but paid for or agreed or understood to be paid for by such aliens, would amount to a majority of the membership or the issued capital stock of such company, association or corporation;

(c) The execution of a mortgage in favor of an alien mentioned in section two hereof if said mortgagee is given possession, control or management of the property.

The enumeration in this section of certain presumptions shall not be so construed as to preclude other presumptions or inferences that reasonably may be made as to the existence of intent to prevent, evade or avoid escheat as provided for herein.

Sec. 10. If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both.

Sec. 11. Nothing in this act shall be construed as a limitation upon the power of the state to enact laws with respect

to the acquisition, holding or disposal by aliens of real property in this state.

Sec. 12. All acts and parts of acts inconsistent or in conflict with the provisions hereof are hereby repealed; provided, that—

(a) This act shall not affect pending actions or proceedings, but the same may be prosecuted and defended with the same effect as if this act had not been adopted;

(b) No cause of action arising under any law of this state shall be affected by reason of the adoption of this act whether an action or proceeding has been instituted thereon at the time of the taking effect of this act or not and actions may be brought upon such causes in the same manner, under the same terms and conditions, and with the same effect as if this act had not been adopted;

(c) This act in so far as it does not add to, take from or alter an existing law, shall be construed as a continuation thereof.

Sec. 13. The legislature may amend this act in furtherance of its purpose and to facilitate its operation.

Sec. 14. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The people hereby declare that they would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional.

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Supreme Court of the United States,

OCTOBER TERM, 1922.

No. 267.

U. S. WEBB, as Attorney General of the State of California, and C. C. COOLIDGE, as District Attorney of Santa Clara County, State of California,
Appellants,

against

J. J. O'BRIEN and J. INOUYE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Appellees' Points.

This is an appeal from an order granting the appellees' motion for a preliminary injunction restraining the appellants from bringing or permitting to be brought against the appellees any proceeding at law or in equity for the purpose of enforcing an act of the State of California entitled "An Act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain

cases, prescribing the procedure therein, requiring reports of certain property holdings to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith," submitted by the initiative and approved by the electors November 2, 1920, from preventing the appellees executing a cropping contract in the form described in the bill of complaint, and from causing them to be arrested for alleged violation of the terms and provisions of said act.

The constitutionality of the law having been challenged, pursuant to statute the motion for the injunction was heard and decided by a court composed of the Honorable William H. Hunt, Circuit Judge, and Honorable Benjamin F. Bledsoe and Honorable Maurice T. Dooling, District Judges (*Rec.*, pp. 17-20).

The statute involved in this action is the act whose constitutionality is the subject of controversy in *Porterfield and Mizuno* v. *Webb, as Attorney General of the State of California, and Woolwine, as District Attorney of the County of Los Angeles*, October Term, 1922, No. 299, argued herewith. Only certain aspects of these questions will be taken up in this brief, although the argument made in the *Porterfield* case against the constitutionality of this legislation is regarded as applicable to and controlling of the case at bar.

The court below having, however, enjoined the appellants on the ground that the act, even if constitutional, did not prohibit the execution of the contract which is referred to in the bill of complaint herein, the present brief will be confined to an argument in support of the correctness of the decision rendered.

The provisions of the Statute Applicable to this Action.

"Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state."

"Sec. 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent, and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

"Sec. 8. Any leasehold or other interest in real property less than the fee, hereafter acquired in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association or corporation mentioned in section three of this act, shall escheat to the state of California. The attorney general or district attorney of the proper county shall institute proceedings to have such escheat adjudged and enforced as provided in section seven of this act. In such proceedings the court shall determine and adjudge the value of such leasehold or other interest in such real property, and enter judgment for the state for the amount thereof together with costs. Thereupon the court shall order a sale of the real property covered by such leasehold or other interest in manner provided by section twelve hundred seventy-one of the Code of Civil Procedure. Out of the proceeds arising from such sale,

the amount of the judgment rendered for the state shall be paid into the state treasury and the balance shall be deposited with and distributed by the court in accordance with the interest of the parties therein. Any share of stock or the interest of any member in a company, associataion or corporation hereafter acquired in violation of the provisions of section three of this act shall escheat to the state of California. Such escheat shall be adjudged and enforced in the same manner as provided in this section for the escheat of a leasehold or other interest in real property less than the fee."

"Sec. 9. Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state if the property interest involved is of such a character that an alien mentioned in section two hereof is inhibited from acquiring, possessing, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein.

"A prima facie presumption that the conveyance is made with such intent shall arise upon proof of any of the following groups of facts:"

It is unnecessary to enumerate them, since there is nothing in the record which brings the case within any of the categories mentioned.

"Sec. 10. If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both."

The Bill of Complaint.

The plaintiff O'Brien is a citizen of the United States and of the State of California. The plaintiff Inouye is a Japanese, a subject of the Emperor of Japan, and a resident of the Northern District of California. The defendant Webb is the Attorney General of California, and the defendant Coolidge the District Attorney of Santa Clara County, California (*Rec.*, p. 1).

The plaintiff O'Brien is and for some years past has been the owner of a ten acre tract situated in Santa Clara County, California. The property is agricultural in character and is particularly adapted to the raising of strawberries, loganberries, raspberries and vegetables, and for a number of years has been and now is being devoted to that and kindred agricultural purposes.

The plaintiff Inouye is a capable farmer, in all respects a desirable and competent person to farm such realty and to enter into a cropping contract for the growing of crops upon the land. O'Brien desires to execute a cropping contract with Inouye, which is set forth in the bill of complaint, and Inouye wishes to enter into the employ of O'Brien in accordance with such proposed contract, the execution of which is necessary in order that the land may be farmed to the best advantage, that O'Brien may secure the largest return from it, and that Inouye may receive compensation therefrom.

If the plaintiffs are prevented from entering into the proposed contract or any cropping contract substantially in the form set forth in the bill of complaint, Inouye will be deprived of his right to earn a living in the business for which

he is best fitted and which he understands, and will be seriously embarrassed in his efforts to earn a living for himself, and if O'Brien is prevented from entering into the contract or a cropping contract in substantially the same form he will be seriously obstructed and interfered with and will suffer great damage in the management and control of his property.

Both of the plaintiffs are law-abiding and wish to conform in every way with all proper laws, but in view of the threats of the defendant Webb, as Attorney General of the State of California, they fear to enter into the contract, and will be prevented from doing so unless protected by the injunction of the court (*Rec.*, pp. 2, 3).

The defendants have threatened to enforce against the plaintiffs should they enter into the contract, the act above referred to, and will enforce the act and all of its terms against the plaintiffs if they should execute the cropping contract referred to in the bill of complaint, and will forfeit or attempt to forfeit the real property to which the contract relates to the State of California by escheat proceedings, and will prosecute the plaintiffs criminally for an alleged violation of the act. *Rec.*, p. 3.

The act in its terms is so drastic and the penalties attached to a violation of its terms are so great, that the plaintiffs may not make or execute the cropping contract even for the purpose of testing its constitutionality and validity or its application to the contract, and unless the court should determine the validity and application of the act in this proceeding the plaintiffs would be compelled to submit to the act, whether it be valid or invalid, to the defendants' interpretation of it and to their threats in connection therewith, and

will be thereby deprived of their property without due process of law and denied the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States, which both of them invoke (*Rec.*, pp. 3, 4).

The Contract Proposed to be Executed.

It is described as a cropping contract. By its terms O'Brien recites that he is the owner of the ten acre tract above referred to; that he "wishes to employ Inouye (who is described as the Cropper) for a period of four years, being from the first day of December, 1921, to the first day of December, 1925, as an employee for the purpose of planting, cultivating and harvesting crops to be grown on Owner's (O'Brien's) land above described, under the following terms and conditions:" (*Rec.*, p. 6.) The contract then contains the following stipulations of O'Brien, the owner, who agrees (*Rec.*, pp. 6, 7):

> "A. *To employ Cropper* and not to interfere with him in the planting, cultivating and harvesting of the crop in any way, and to protect Cropper during the existence of this contract against interference by any person whatsoever, *the general possession of the land above described being reserved to Owner.*"
>
> "B. To provide and maintain housing accommodations for Cropper."
>
> "C. To furnish all necessary tools, farming implements, tractors and the oil and gasoline for the operation thereof, horses and horse feed for the planting, cultivating and harvesting of the crop or crops herein provided for, during the term hereof, and to furnish any and all things necessary for the proper farming of the land herein described for the purposes herein set forth."

"D. To haul the said crop when properly prepared by Cropper for hauling and shipping, to the packing house or nearby station."

"E. To permit the Cropper to work the land upon the conditions herein set forth, *provided that the Cropper shall have no interest or estate whatsoever in the land described herein.*"

"F. *To give to Cropper fifty (50) per cent. of all crops grown on the above described land during the period of this agreement, as compensation for the services and labor of the Cropper, as herein set forth.*"

"G. To grant to the Cropper his right to a division of the crop *after it is harvested and before its removal from the land,* provided that the Cropper exercises his option thereunto, and in the event of the exercise of such option, to grant to Cropper the right to remove from the land his share of the crops within a reasonable time, even though said time shall extend beyond the term of the Cropper's employment as herein provided for."

"H. To grant to the Cropper the right to carry out the terms of this agreement by employing such agents or employees as he shall see fit, and to give to such agents or employees free ingress or egress from said property, or the right to live thereon, without let or hindrance."

The contract then contains the following stipulations of the Cropper, who agrees (*Rec.*, p. 8):

"I. After the execution and delivery of this agreement, and at the proper time *to plant, cultivate and harvest the following specified crops:* strawberries, raspberries, loganberries and vegetables in a good and farmerlike manner."

"J. To maintain and keep up the personal property and to return to owner at the ter-

mination of this agreement, all farming tools, implements, tractors, horses and all other personal property of every kind and character, the use of which is herein granted, in as good condition as they were when delivered to Cropper, reasonable wear and tear thereof excepted."

"K. To keep the banks and bottoms of irrigation ditches on, adjacent to and tributary to said land, free from weeds and foul growths; to repair and maintain all levees; to prevent losses of irrigation water, and in particular to prevent the overflow thereof into driveways and roads and to guard against fires of all kinds."

"L. To harvest all crops when ripe, to pack the same in accordance with best standards, to prepare the same for shipping or transportation if necessary."

The contract then contains the following mutual agreements (*Rec.*, pp. 8, 9):

"It is mutually understood and agreed by the parties hereto that in case of the land being sold, during the term of this agreement, the Owner shall have the option to terminate this agreement by paying to Cropper *for his own services* at the rate of $100 per month from the beginning of the calendar year in which this agreement is to be terminated, together with all money expended or incurred by said Cropper *for and on account of labor and materials furnished for the planting and cultivation of the crop or crops then growing on the land,* with interest at the rate of seven (7) per cent. per annum, or allow Cropper to harvest the crop or crops then growing thereon."

"It is further mutually understood and agreed by the parties hereto that in case of any breach of this contract on the part of Owner or in case of any hindrance with or

prevention of farming upon said or any part of said land, Owner agrees to pay to Cropper, within thirty days from the date of such breach, all moneys expended or incurred by Cropper for the planting and cultivation of the then growing crop or crops, and in addition thereto a sum equivalent to twenty (20) per cent. of such total amount so expended or incurred by Cropper, as his liquidated damages for the cancellation of this agreement, provided, however, that Cropper, at the date of such breach, shall have fully kept and performed all the covenants by him to be performed under this agreement."

The Proof of Defendants' Threats to Proceed Against Parties to Cropping Agreements.

In connection with the motion for the injunction, an affidavit was presented to the court which sets forth various letters and announcements issued and published by the Attorney General, in which he indicated his purpose to proceed under the provisions of the statute relating to escheat and to the enforcement of criminal proceedings against persons entering into agreements of the character proposed by the appellees which he asserted came within the inhibition of the act. These documents contain, among other clauses, the following:

"The efforts of aliens ineligible to citizenship to acquire land in this state in violation or evasion of the Alien Land Laws of 1913 and 1920 are in various forms continuing, and to successfully meet these efforts there is required the most intelligent and vigilant action by all officers in any manner charged with duties in the enforcement of these laws. * * *

Where the effort is not to acquire title but to secure the beneficial use of the land, vari-

ous forms of contracts are resorted to, such as an agreement that the ineligible alien shall occupy, possess and farm the land and receive a share of the product. In the majority of instances these transactions involve the participation of one or more American citizens, fully advised in reference to these laws and of necessity well knowing that the indirect method of dealing is adopted for the purpose of avoiding them, and not infrequently their action constitutes a direct violation of the penal provisions of the Alien Land Act of 1920. * * *

The act of 1920 makes it your duty, as well as that of the Attorney General, to commence the proper proceedings to have an escheat adjudged whenever requisite evidence therefor is obtained.

With the view of supplementing these laws and providing further means for their enforcement a new section, numbered 931, was added to the Penal Code by the last legislature, approved by the Governor, and will become effective on July 28, 1921, which directs that the grand jury of the county shall investigate any transaction appearing to be in violation or avoidance of the Alien Land Law, and your assistance should, of course, be fully given to the grand jury in such investigations. The administration of the penal provisions of the Alien Land Law rests largely with the local officers, to whom the evidence of violations is most accessible, and who are empowered by law to secure such assistance as may be required and to incur such expense as may be necessary in performance of the duties of enforcement.

The colonization in many parts of this state by ineligible aliens, and particularly by alien Japanese, is so well known as to make its statement unnecessary and I know that you will agree with me that every effort should be made to secure the strict enforcement of these laws.

Your attention is especially called to the fact that the penal provisions of these laws apply alike to all persons, citizens as well as aliens, and I urge you, and through you the grand jury and other local officers, to make the most vigorous efforts to secure for this state the objects which these laws seek to attain.

In order to insure the fullest cooperation I am addressing this letter to each District Attorney in the state." (*Rec.*, pp. 10, 11.)

In answer to a question submitted to him as to the validity of cropping contracts with Japanese according to various plans described, the Attorney General said:

"Prior to the adoption of the Alien Land Law of 1913, aliens ineligible to citizenship could legally purchase or lease agricultural lands. Where it was not sought to acquire the title, the custom of leasing was very common and the increasing acreage of farming lands passing into the possession and control of alien Japanese became so alarming that the legislature adopted in 1913 the so-called Alien Land Act.

I drafted this act, but the original act did not authorize leasing of agricultural lands, and upon the representation of certain land owners that the prohibition of leases at that time would work a grave injury to such owners, and that if a reasonable time be provided for, such owners would be able to adjust themselves to the new conditions and avoid the threatened losses the legislature, yielding to these representations, changed the original draft by adding the provision permitting leases for a term of three years. Under the operation of this leasing clause the acreage passing to the control of Japanese rapidly increased, and by vote of the people the leas-

ing provision was eliminated at the election of 1920. * * *

The propositions stated in your letter evidence a plan whereby ineligible aliens may be given the possession, enjoyment and beneficial use of agricultural lands as completely as though this were accomplished through the direct payment of rental, whether such payment be made in cash or by a portion of the crop. It would seem that an alien placed in possession of lands under such an agreement would have such rights in the land as given by the usual form of lease. Such arrangements seek to accomplish what the statute prohibits without incurring its penalties. * * *

I think the agreements suggested in your three propositions are prohibited by the terms of the Alien Land Act and are wholly antagonistic to the spirit and purpose actuating the electorate of this state in adopting it." (*Rec.*, pp. 12, 13.)

The Attorney General also issued a letter to all of the District Attorneys of California, in which he said (*Rec.*, p. 13):

"Where the effort is not to acquire title but to secure the beneficial use of the land, various forms of contracts are resorted to, such as an agreement that the ineligible alien shall occupy, possess and farm the land and receive a share of the product. In the majority of instances these transactions involve the participation of one or more American citizens, fully advised in reference to these laws and of necessity well knowing that the indirect method of dealing is adopted for the purpose of avoiding them, and not infrequently their action constitutes a direct violation of the penal provisions of the Alien Land Act of 1920."

Further opinions and declarations of the Attorney General to the same effect, in which he specifically deals with cropping contracts and declares them to come within the terms of the provisions of the Alien Land Act, are to be found *Rec.*, pp. 14-17.

The motion for injunction having been heard on these papers, the District Court unanimously decided to grant the preliminary injunction prayed for, the opinion of the court having been written by Judge Dooling and a concurring opinion by Judge Bledsoe (*Rec.*, pp. 20-30).

POINTS.

I.

The cropping contract between O'Brien and Inouye, the execution of which the appellants contend would subject the parties to punishment by imprisonment or fine, or both, and would immediately result in an escheat of the land to which it relates to the State of California, does not come within the terms of the Act, because it does not effect a transfer of real property or of an interest therein.

The Statutory Provisions to be Interpreted.

This statute does not undertake to prohibit any aliens from entering into a contract for the performance of labor upon agricultural lands within the State of California. Had it attempted to do so, the effort would have been nugatory, because it would clearly offend against the provision of

the Fourteenth Amendment to the Constitution of the United States which guarantees them against deprivation of their liberty and property without due process of law.

Yick Wo v. *Hopkins,* 118 U. S. 356.
Truax v. *Raich,* 239 U. S. 39, 41.

Section 1977 of the United States Revised Statutes, which was enacted on May 31, 1870, (Ch. 114, 16 St. L. 144), pursuant to Section 5 of the Fourteenth Amendment, which empowers Congress to enforce by appropriate legislation the provisions of the article, declares:

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory *to make and enforce contracts,* to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other."

Like the due process and equal protection clauses of the Fourteenth Amendment, this statutory provision applies the universal principle proclaimed to aliens, as well as to citizens, regardless of color.

Whitfield v. *Hanges,* 222 Fed. Rep. 745.

It follows that, in the interpretation of the California Alien Land Law, the Fourteenth Amendment and Section 1977, just quoted, must be continually borne in mind.

In order to give the statute of 1920 any constitutional effect whatever (which we have con-

tended, in the *Porterfield* case, cannot be done), it must relate to the acquisition of the title of real property or of an interest therein. That is the only reasonably significance that can attach to the language of Sections 1, 2 and 3.

This is emphasized by the language of Section 7, which refers to the escheat of "any real property hereafter acquired in fee in violation of this act." It is accentuated by the language of Section 8, which relates to the escheat of "*any leasehold or other interest in real property less than the fee,* hereafter acquired in violation of the provisions of this act," and by the concluding sentence of Section 8, which refers to the escheat of shares of stock or the interest of any member of a company, association or corporation, that such escheat shall be enforced in the same manner as provided for an escheat "of a leasehold or other interest in real property less than the fee."

A further index of the purpose of the statute is afforded by the language of Section 9, which avoids "every transfer of real property or of an interest therein, though colorable in form."

Finally, the penal provision contained in Section 10 refers to a conspiracy "*to effect a transfer of real property, or of an interest therein.*"

The Nature of the Contract to which the Statute Is to be Applied.

The cropping contract set forth in the bill of complaint does not constitute a transfer of real property. Consequently, unless it constitutes a leasehold or creates an interest in the real property therein described, it does not come within the purview of the act, and the threats of the de-

fendants to escheat the property and to prosecute the appellees for a crime, or to avoid the instrument, would interfere with the appellees' constitutional and contractual rights and justify the injunction issued by the District Court.

The terms of the cropping contract clearly indicate that it neither creates a leasehold to Inouye nor confers upon him an interest in the land belonging to O'Brien. It is in its essence a contract of employment. It contains not a single word or phrase essential to the creation of a lease. It does not convey or transfer any land to Inouye. It does not provide for the payment by him of any rent. It does not give to him the general possession of the land, but, on the contrary, the general possession is reserved to O'Brien, the owner. It does not confer upon him the ownership of the crops growing on the land. It does not even provide that he shall give to the owner any part of the crops produced. On the contrary, O'Brien, the owner, is to compensate Inouye for his labor and services, by giving to him one-half of the crops grown on the land, and in order to avoid any possibility of a misinterpretation the instrument merely permits Inouye to work the land and provides that he shall have no interest or estate whatsoever in it. There is not a word which would justify an inference that the contract was anything else than a contract for personal services rendered by Inouye. Nor does it by its terms inure to or bind his personal representatives or assigns. From the beginning to the end of the document the relation between the parties as that of employer and employee, is meticulously maintained.

One would suppose from a mere perusal of the contract and this analysis of its terms, that the

Alien Land Act has no application to it. Yet, in view of the insistence of the appellants that it does apply and of the great importance of the decision of this case to land owners in California and to those lawfully within the State of California who desire to exercise their constitutional right of earning their livelihood by performing legitimate agricultural labor, whom the appellants seek to deprive of that right, we venture to refer the Court to some of the many decisions rendered in the various States of the Union that have adjudged that contracts of this character do not constitute leaseholds and do not confer an interest in land.

The Controlling Canons of Interpretation.

Preliminarily, however, it is important to advert to the circumstance that to sustain the appellants' contention would involve the escheat of O'Brien's property—a forfeiture—and the imprisonment or fine, or both fine and imprisonment, of both O'Brien and Inouye under the penal provisions of the act.

It is proverbial that the law abhors a forfeiture. It is equally one of the canons of statutory interpretation that a penal law is to be strictly construed, and that, irrespective of what may be conceived to have been the possible purpose of the legislature, it is only when it has defined that purpose in clear, explicit and unmistakable terms, that property may be forfeited or imprisonment or fine inflicted for an act done or omitted.

Statutes in derogation of common law rights (*Meister* vs. *Moore*, 96 U. S. 79; *Shaw* vs. *North Pennsylvania Ry. Co.*, 101 U. S. 565; *Texas &c.*,

Ry. Co. vs. *Abilene Cotton Oil Co.*, 204 U. S. 426, 437; *Thompson* vs. *Thompson*, 218 U. S. 618) and all statutes of a penal nature, whether civil or criminal, must be construed strictly in favor of those whom they affect, irrespective of whether the penalty is forfeiture of property, fine, or imprisonment.

Fairfax vs. *Hunter*, 7 Cravath 625.
U. S. vs. *Wiltberger*, 5 Wheat. 96
U. S. vs. *Baltimore etc., R. R. Co.*, 222 U. S. 8.
Huntington v. *Attrill*, 146 U. S. 657.
Diversey v. *Smith*, 103 Ill. 378, 390.
Bell v. *Farwell*, 176 Ill. 489.
Drew v. *Russell*, 47 Vt. 250, 253.
Gardner v. *N. Y. &c. R. Co.*, 17 R. I. 790, 791.

If the acts alleged do not come clearly within the prohibition of the statute, its scope will not be extended to include other offenses than those which are clearly prescribed and provided for; and if there is a fair doubt as to whether the act charged is embraced in the prohibition, that doubt is to be resolved in favor of the defendant.

U. S. vs. *Hartwell*, 6 Wall. 396.
Harrison vs. *Vose*, 9 How. 378.
Erbaugh vs. *U. S.*, 173 Fed. Rep. 433.
Chase v. *Curtis*, 113 U. S. 452.
United States v. *One Cadillac-Eight Automobile*, 255 Fed. Rep. 173.
The Ben R., 134 Fed. Rep. 784.
People v. *Craig*, 195 N. Y. 190.
Western Union Telegraph Co. v. *Axtell*, 69 Ind. 199.
State v. *Peabody*, 103 Me. 327.

The Law and Decisions Relating to Croppers Agreements.

Working agricultural land on shares has been for many years a prevalent practice in all parts of the country and has given rise to many decisions. Whatever differences may have existed at an earlier period as to the effect of cropping contracts, the law is now well settled, and unless the provisions of the agreement clearly indicate an intent to create a leasehold or to confer an interest in land on which the work is to be done, the relation between the owner of the property and the person cultivating the land is regarded as that of employer and employee.

In 1 *Washburn on Real Property, Fifth Edition*, p. 604, the author says:

> "There is a mode of letting lands, not unusual in the country, where the tenant is to cultivate them, and share the crops with his landlord. In respect to these tenancies, many of the ordinary rules heretofore explained do not apply, and the rights of the parties, moreover, depend much upon the particular terms of their agreement. Thus, if it amounts only to an agreement on the part of the one who is to do the labor to take charge of and manage the land on shares, it is not regarded as a lease, but more in the nature of a payment for services rendered by a part of the crops raised. In order to constitute a lease, the occupant must have an interest in the soil and freehold. So it is said, a letting of lands upon shares, if for a single crop, is no lease of the land, and the owner alone must bring trespass for breaking the close. And the same rule prevails if it be for successive crops."

In 2 *Reeves on Real Property,* Section 564, the author says:

> "He who goes on the property of another by virtue of no authority or contract, except one by which he is to farm the land and divide the products with its owner, cannot establish the requisites of a tenancy for years as explained in the last preceding paragraph. He is there merely for a temporary purpose—to produce a crop for himself and the owner of the land. His possession, moreover, closely exemplifies, in the law of today, the original status of temporary holders or farmers of real property. He may be called the last survivor of the ancient theory, that made such holders bailiffs or servants; and his contract with the land owner merely to cultivate on shares has not yet (as a rule) been held sufficiently strong and comprehensive in itself to make him a tenant. The relationship between the two is that of master and servant; and, as the crops grow, which are ultimately to be divided, they are, according to the weight of authority, owned by them as co-owners—in most States of this country today as tenants in common—in the proportions fixed by their agreement."

In *Jones on Landlord and Tenant,* Section 49, the author lays down the rule that if one be hired to work land, receiving for his compensation a part of the produce, he is a cropper, and not a tenant, having no interest in the land but receiving his share as the price of his labor. "The possession is still in the owner of the land, who alone can maintain trespass, nor can he distrain, for he does not maintain the relation of landlord and tenant."

In *Warvelle on Ejectment,* Section 26, dealing with the same subject, the author says:

"It is well settled that such an agreement does not create a tenancy of any kind on the part of the cultivator. At best he is only a tenant in common of the crop, which is generally regarded as personalty, and the legal possession of the land is in the owner."

See also:

McAdam on Landlord and Tenant, Fourth Edition, §45.

In 17 *Corpus Juris*, title "Crops," p. 382, we find the following statement, abundantly supported by authorities from many of the States:

"§9. A. Definition. A cropper is one who, having no interest in the land, works it in consideration of receiving a portion of the crop for his labor.

§10. B. Existence of Relation. The intention of the parties as expressed in the language they have used, interpreted in the light of the surrounding circumstances, controls in determining whether a given contract makes the cultivator a cropper. If the language used imports a present demise of any character by which any interest in the land passes to the occupier, or by which he obtains the right of exclusive possession, the contract becomes one of lease, and the relation of landlord and tenant is created. If, on the other hand, there is no language in the contract importing a conveyance of any interest in the land, but by the express terms of the contract the general possession of the land is reserved by the owner, the occupant becomes a mere cropper.

§11. C. Rights and Liabilities. In General. A cropper's contract gives the cropper no legal possession of the premises further than as an employee; the legal possession is in the employer. The cropper is entitled to

> go upon the land for the purpose of producing, harvesting, and dividing the crop, but when this is done his possessory right ceases. Before the division of the crop, the whole is the property of the landlord, and the cropper has no legal title to any part thereof, although in some jurisdictions the parties are held to be tenants in common. When, however, their respective rights in the crop have been adjusted and the cropper's part has been specifically set aside to him the title thereto is in him. Apart from these rules of law, the rights and liabilities of the land owner and the cropper are governed by the terms of the particular contract into which they enter."

One of the early cases in which this subject came up for adjudication is *Caswell* v. *Districh*, 15 Wend. (N. Y.) 378. There the plaintiff's testator had agreed to let the defendant have his farm for one year. The latter agreed to sow grain and give the testator certain proportions of the product according to description. The plaintiff proved the quantities raised by the defendant, and rested. The defendant contended that the instrument produced was an agreement to work the land on shares, and not a lease securing rent, and that the parties, therefore were, tenants in common in the crops, and that an action for rent of the premises would not lie. The trial court so held, and on appeal to the Supreme Court the judgment was affirmed in an opinion written by Mr. Justice Nelson, subsequently a member of this Court, who said:

> "The agreement between the parties was a letting of the premises upon shares, and, technically speaking, was not a lease. There is nothing which indicates that the stipulation for a portion of the crops was by way of rent;

but the contrary. The shares were of the specific crops raised upon the farm. It is very material to the landlord, and no injury to the tenant, that this view of the contract should be maintained, unless otherwise clearly expressed, for then the landlord has an interest to the extent of his share in the crops. If it is deemed rent, the whole interest belongs to the tenant until a division. * * *

"This case is clearly distinguishable from that of *Stewart* v. *Dougherty*, 9 Johns. R. 108. There the court, from the correspondence between the phraseology of the instrument and the terms usual in leases in the reservation of rent, came to the conclusion that the proportion of the crops specified in the agreement was intended as payment of rent in kind, and that therefore the whole interest belonged to the tenant. If my conclusion be correct, then the parties were tenants in common in the crops, and as the plaintiff stood in the place of her testator, she was not entitled to sustain her action."

In *Putnam* v. *Wise*, 1 Hill, 234, the owners of a farm agreed with two persons, by contract under seal, that the latter should occupy and work it for a year, and if they performed, then to have it the same way for a year longer, the occupiers agreeing, in consideration thereof, to yield and pay the owners one-half of all the grain, &c. raised. It was held that until a division, or something equivalent, the parties were tenants in common of the grain; and this though the contract contained the technical phraseology of a lease reserving rent.

Both of these cases were considered in *Bernal* v. *Hovious*, 17 Cal. 541. There one Vasques entered into an oral agreement with one Bernal in relation to the use and cultivation of a farm situated in San Mateo County. The agreement was

called by the parties a lease. The substance of Vasques' testimony was that he leased the premises to Bernal for three years; that the lease was not in writing, but that by its terms he was to furnish the seed, the farming tools and implements and the wagons and horses, and also the sacks for his share of the grain; that Bernal was to do the work upon the farm and give him for the use of the land one-third of the grain raised, free from the expense of threshing—his share to be taken after the grain was put in sacks. A question arose as to the ownership of the grain raised on the land, and that depended upon whether the agreement was a lease or a contract to work the farm on shares. It was held that it was the latter and that the parties were tenants in common of the grain until a division was made. Chief Justice Field, subsequently a member of this Court, considering these facts, said (p. 545):

> "The agreement for the use of the farm, though designated by the parties as a lease, is not one in our judgment. It is a contract for the working of the farm upon shares—Vasques of the one part agreeing to furnish the farming implements, the wagons, the horses, and the seed; and Nicholas Bernal, on the other part, agreeing to work the farm, and to give Vasques one-third the grain after it is put in sacks; and, until a division was made between them, the parties were tenants in common of the grain. The agreement is not materially different from the one in the case of *Caswell* v. *Districh* (15 Wend. 379). * * * The case of *Putnam* v. *Wise* (1 Hill, 235) is a much stronger case than the one at bar, and is conclusive of the point that Vasques and the plaintiff were tenants in common of the grain to be divided. In that case the agreement was under seal, and contained the phraseology of

a lease reserving rent. Its language was that the parties of the first part 'do by these presents lease, and to farm let' the premises, and that the parties of the second part covenant, in consideration of the use of the land, to 'yield, pay and give one-half of all the grain raised by them' on the farm; and the court said: 'It is a case in which we ought not to tie ourselves up to the consideration of mere words. The substance should be looked at; and that, as it would be universally understood among farmers, is an agreement between owners and occupants, that the latter should come in rather as servants than tenants; each party taking an interest as common owners in the crops, and other products, as they accrue, by way of compensation to the owners for the use of their farm, and the occupiers for their labor. (Vid. *Maverick* v. *Lewis* v. *McCord*, 211.), * * * To the same effect is the case of *Dinehart* v. *Wilson* (15 Barb. 595). There the agreement was in the form of a lease, the tenant to deliver to the lessor a certain portion of each crop; and it was also held, the court resting its decision upon the case of *Putnam* v. *Wise*, that until a division was made the parties were tenants in common of the crops. (See, also, *Harrower* v. *Heath, et al.*, 19 Barb. 331."

In *Walls* v. *Preston*, 25 Cal. 59, the contract not only used the word "lease" as descriptive of the arrangement between the parties, but it also provided for the payment of a rental by the person to whom the lease was given, in the form of the delivery to the owner by the lessee of one-sixth of the crop. After considering the cases the Court said:

"The two principles deducible from those cases are these: First—If the agreement contains terms which by themselves would im-

port a lease, and other terms which provide for a division of the crops, and it is doubtful which it is—a lease or a cropping contract—it will be deemed a cropping contract, by reason of a division of the crops; and second, where the agreement provides for a division of the crops between the owner and occupant, they are held to be tenants in common of the crop. It cannot be maintained, upon those authorities, and certainly not upon principle, that a lease, in the usual form of a demise, for a term of years, with covenants sufficient to give the lessee the exclusive possession of the land during the time, and to require him to yield up the possession at the end of that term, shall not be a lease, and the occupant shall not be a tenant, but shall be a mere servant of the owner, because the parties have made provisions for a division of some portion or all of the crops that may be produced."

In *Clarke* v. *Cobb*, 121 Cal. 595, 54 Pac. Rep. 74, a contract was made whereby one of the parties agreed to farm land let to him for a term of years and to give annually for the use thereof a certain portion of the products grown thereon. It was held to be a lease and not a cropping contract, and the portion of the product to be delivered to the landlord when gathered was regarded as rent. The Court said:

"At the threshold of this investigation, it becomes important to determine the legal status of the contracts entered into with Cobb by Clarke and his executors. That these contracts were leases, that the conventional relation of landlord and tenant existed between the parties, and that the grains and fruits to be delivered to the landlord when gathered and harvested were rent, we are entirely satisfied. Rent is a compensation paid for the

use of land. It need not be money. Any chattels or products of the soil serve the purpose equally as well. These contracts are in no sense cropping contracts. The single difference differentiating them from ordinary conventional leases is that the rent is to be paid in products of the soil, after harvest, rather than in money. But such difference is wholly immaterial as changing the character and aspect of the instruments. It is substantially conceded that the landlord and tenant are co-tenants in the land, but it is claimed that they are co-tenants in the crops to be raised. The authorities of this State recognize that such conditions may exist. *Bernal* v. *Hovious*, 17 Cal. 544; *Walls* v. *Preston*, 25 Cal. 59. But we find no apt words here to disclose such a status. When it is established that a certain contract is a lease and that the relation of landlord and tenant exists between the parties, there must be some appropriate words in the contract to indicate that the crops raised on the lands are to be held in co-tenancy, or such will not be the conclusion reached. If there is nothing in the language to indicate that intention, then the products to be delivered to the landlord, after harvest, by the tenant, will be deemed the property of the tenant until that time, and treated as rent to be then paid. * * * This court held in *Bernal* v. *Hovious, supra*, that the contract under consideration in that case was a cropping contract; and of course, when such is the fact, the title to the products of the land necessarily vests in both parties, for the relation of co-tenancy is created. The facts of that case are broadly different from the facts here presented."

It is well to pause here for the purpose of contrasting the language of the contracts in *Walls* v. *Preston* and *Clarke* v. *Cobb* with that of the instrument in the case at bar. Here the contract

contained no words of demise, no reference to a lease. The crops belonged to O'Brien and not to Inouye. The latter was merely an employee, who received a share of the crops produced, from O'Brien, the owner of the land, as compensation. It was expressly stipulated that O'Brien was to have the general possession of the land, and that Inouye was to have no interest or estate in it whatsoever. The element of a lease and of rent is entirely absent, but that of employment and compensation is paramount.

The fundamental idea of the California decisions is based on the principle laid down in *Caswell* v. *Districh, supra.* Later New York cases clarify the doctrine to a marked degree.

Thus, in *Taylor* v. *Bradley,* 39 N. Y. 129, Judge Woodruff said (p. 139):

> "Parties are certainly at liberty to define and establish their legal relations by the use of terms legally appropriate to the object; and it is not clear to my mind that courts should not give effect thereto, according to their understood legal meaning.
>
> "Hence, when A agrees with B that he will employ B, with his team, etc., upon his farm, *whether for one year or five,* leaving B at liberty to cultivate such fields, and plant such crops as he shall see fit, with just regard to what good husbandry requires, and to pay B, for his work, labor and services, one-half of the crops raised,—it is obvious that the parties intend an agreement for work, labor and services, to be paid for by A in a share of the results.
>
> "On the other hand, if A should demise, lease and let the farm to B, to have and to hold for the term of one or five years, to be cultivated in a husbandlike manner, rendering and paying to A an annual rent for the use of the farm, to wit, one-half of the crops raised,—

> I perceive no sensible reason why the parties should not be deemed to intend an actual and technical lease, which would entitle the lessee to *possession*, give him a *term* in the land, make his payment *rent* in the technical sense. It may well be inferred from this language, contradistinguished from the other, that here it was intended that the tenant should have exclusive possession and the whole ownership for the term, subject only to his duty to pay the rent as it accrued."

The case at bar is much stronger for the appellees than the first illustration just quoted, for here O'Brien, the owner, was to furnish all necessary tools, farming implements, tractors and the oil and gasoline for the operation thereof, horses and horse feed, for the planting, cultivating and harvesting of the crops during the term of the agreement, and to furnish any and all things necessary for the proper farming of the land for the purposes in the agreement set forth (*Rec.*, p. 7), and was to haul the crop when properly prepared by Inouye for hauling and shipping to the packing house; while in the case supposed, the team and appliances were to be supplied by the cultivator of the land.

In *Unglish* v. *Marvin*, 128 N. Y. 380, the parties entered into an oral contract, by which the plaintiff agreed to occupy seven or eight acres of defendant's farm for a period of five years. The defendant was to furnish for plaintiff's use and occupancy the house and garden on the premises, the lower part of the barn, pasture for a horse and cow, and straw for feed and bedding, and the use of a horse in the busy season; to prepare so much of the ground as he might conclude to be desirable for the reception of plants and bushes, furnish

one-half the sets of plants and bushes, pay one-half the cost of picking the small fruits and berries, and build a dry-house. The plaintiff was to furnish half the sets of plants and bushes, plant the small fruits, various kinds of berries and currants, to hoe and care for the berries then on the place, cultivate and care for the plants and bushes to be set out, to pick the berries and currants when ripe, market and sell them, to dry and sell the remainder, and to divide the rest less the cost of picking, equally between himself and the defendant. The Court said:

> "The relation of landlord and tenant in any form was not created either by the agreement itself or in consequence of any occupancy under it," citing *Taylor* v. *Bradley, supra*, and *Reynolds* v. *Reynolds*, 48 Hun, 142.

In *Reynolds* v. *Reynolds*, just referred to, the defendant agreed, in writing, to permit the plaintiff for the term of five years to work his farm. The plaintiff agreed to perform all the work and labor on the farm during that period and to conduct the farm in a first-class manner. Each of the parties was to furnish one-half of the seed required and the grain produced was to be equally divided. Both parties were to reside on the farm in separate houses. Presiding Justice Barker said (48 Hun, 144):

> "By this agreement the legal relation of landlord and tenant was not created. The parties to the agreement became tenants in common of the grain and the other products of the farm produced by the labor and care of the defendant. * * * It is now well settled by all the more recent decisions, that the form of the agreement is not controlling in determining whether the relation of landlord and

tenant has been created; that it is the substance of the contract which determines its legal character. In the division of property growing crops are classed as personal property, and they may be sold on execution and the title thereto transferred by a parol agreement, and as between the heirs at law and the personal representatives of a deceased person, the latter take title."

To the same effect are:

Vaughn v. *DeWandler*, 63 How. Pr. 380.
Booher v. *Stewart*, 75 Hun, 214.
Matter of Estate of Ellis, 78 Misc. Rep. 589.

In *Stall* v. *Wilbur*, 77 N. Y. 158, it was held that that growing crops are not part of the real estate upon which they are growing, but are personal property. This decision was approved in *Sexton* v. *Breese*, 135 N. Y. 391, and in *Crosby* v. *Woleben*, 149 App. Div. 338.

That the relation of landlord and tenant will not be implied was recognized by this Court in *Wiggins Ferry Co.* v. *Ohio and Mississippi Ry. Co.*, 142 U. S. 396, 407, where Mr. Justice Brown, referring to that relation, said:

"Such relationship will never be implied when the acts and conduct of the parties are inconsistent with its existence. In *Carpenter* v. *United States*, 17 Wall. 489, 493, it was held by this court that no reason for the implication of a tenancy existed, 'when an express contract or an arrangement between the parties shows that it was not intended by them to constitute the relation of landlord and tenant, but that the occupation was taken and held for another purpose.'"

In *Taylor* v. *Donahoe*, 125 Wis. 513, 103 N. W. Rep. 1099, a contract provided that the defendant should cultivate land belonging to one subsequently becoming a garnishee, raise crops, and care for the stock for a certain "term of service"; that certain expenses should be shared between the parties; that defendant should furnish certain stock and seed, should perform the work in a faithful and husbandlike manner, and receive in full compensation for his services one-third of all the produce of the farm; possession of the premises and title to the crops until divided were to remain in the garnishee, and it was declared that defendant was to be merely an employee. It was held that he was a cropper and not a tenant, so that ownership of the entire crop prior to division was in the garnishee. Referring to these facts Mr. Justice Winslow said:

> "If a tenant, he owned the crop; if a cropper, Donahoe owned it, and was entitled to dispose of it. The distinction between a tenant and a cropper is that the tenant has an estate in the land for a given time, and a right of property in the crops, and hence makes the division thereof between himself and the landlord in case of an agreement upon shares, while a cropper has no estate in the land, nor ownership of the crops, but is merely a servant, and receives his share of the crops from the landlord, in whom the title is. * * * It is always a question of construction of the agreement under which the parties are acting. The agreement in question here seems to us to be very clear and definite upon the subject. It nowhere refers to Finnegan as a tenant, but specifically refers to his work as 'service,' and expressly provides that Donahoe shall pay him for his services by certain shares of the crops, and that possession of the land

> and ownership of the crops are to remain in Donahoe, and that Finnegan is merely to be an employee in the tilling of the land and caring for the stock. Language could hardly be plainer or more appropriate for the purpose of creating a cropper arrangement. The fact that Finnegan was to put some stock on the place and furnish certain seed and tools, and was given the right to use certain rooms in the house, cannot reasonably be considered as changing the relation between the parties, in the face of the definite and certain clauses of the agreement."

In *Guest* v. *Opdyke*, 31 N. J. Law, 552, and *State* v. *Jewell*, 34 N. J. Law, 259, the doctrine of *Caswell* v. *Districh, supra*, was adopted; and in *State* v. *Reynolds*, 67 N. J. Law, 169 50 Atl. Rep. 670, a contract with the owner of a farm to cultivate it for a certain period for a specified share of the crop was held not to create the relation of landlord and tenant although the contractor occupied the farm buildings while so employed. Mr. Justice Gummere said:

> "It is apparent from a reading of it that this agreement does not constitute a lease. It is a contract for the farming of the land and a division of the proceeds, and nothing more. That such an agreement does not constitute the relationship of landlord and tenant between the parties has been frequently decided. * * * Assuming that, under this agreement, Gray is by implication entitled to the use of the buildings thereon during the period covered by it, his occupation of it is a mere remuneration in part for his services, and does not create him a tenant."

The following cases further recognize the doctrine for which we contend:

Ferris v. *Hoglan*, 121 Ala. 240, 25 So. 834.

Gray v. *Robinson*, 2 Ariz. 24, 33) Pac. Rep. 712.
Hammock v. *Creekmore*, 48 Ark. 264.
Maltbie v. *Olds*, 88 Conn. 633, 637, 92 Atl. Rep. 403.
Williams v. *Clever*, 4 Houston (Del.) 458.
Bryant v. *Pugh*, 86 Ga. 625, 12 S. E. Rep. 927.
Alwood v. *Ruckman*, 21 Ill. 200.
Pittsburgh, C. & St. L. R. Co. v. *Thornburgh*, 98 Ind. 201.
Garger v. *Fee*, 140 Ind. 572, 39 N. E. Rep. 93.
Wood v. *Garrison*, 23 Ky. Law, 295, 62 S. W. Rep. 728.
Haywood v. *Rogers*, 17 N. C. 320.
Harrison v. *Ricks*, 71 N. C. 11.
Steele v. *Frick*, 56 Pa. St. 172.
McCormick v. *Skiles*, 163 Pa. 590.
McCutchen v. *Crenshaw*, 40 S. C. 511, 19 S. E. Rep. 140.
Webb v. *Garrett*, 30 Tex. C. App. 240, 7 S. W. Rep. 992.
Mead v. *Owen*, 80 Vt. 273, 67 Atl. Rep. 722.
Parrish v. *Commonwealth*, 81 Va. 1.

Some of the Decisions Cited for Appellants.

The case of *Smith* v. *Schultz*, 89 Cal. 526, 26 Pac. Rep. 1087, cited for the appellants, grew out of a contract in which the parties of the second part "their heirs, executors and assigns" "granted, demised and let" a certain ranch for three years with the privilege to the second parties to keep hogs thereon until a certain day succeeding the

expiration of the lease. The second parties were to plant certain crops and make improvements, the first party to furnish all farming implements, seeds and materials and make certain improvements. The increase of certain hogs and fowls belonged to the first party, and certain crops were to be divided in certain proportions, the sales to be made only upon "mutual consent." The first party could re-enter in case of default in any of the covenants by the second parties, but if such covenants were performed then the second parties might during such term hold the premises without hindrance from the first party "his heirs and assigns." That was clearly a contract of lease. On its face it was expressly assignable. The conventional relation of landlord and tenant existed. In every respect the contract there covered was in direct contrast with that in the case at bar.

Dixon v. *Nicolls,* 89 A. D. (Ill.) 312, was a case where a tenant had exclusive possession of the premises and agreed to pay rent in the form of a portion of the crop, all of which indicated that the parties intended to create the relationship of landlord and tenant.

In *Ferris* v. *Hoglan,* 25 So. Rep. 834, an agreement giving the right to cultivate a vineyard referred to the person to whom it was given as "the lessee," who was to take a reasonable compensation from the proceeds of the sale of the crop and return the balance of the proceeds to the owner. Nevertheless this was held to constitute a contract of employment, and not of lease.

There is nothing in the cases of *Strangeway* v. *Eisenman,* 71 N. W. Rep. 617, and *McNeal* v. *Ryder,* 81 N. W. Rep. 830, cited for appellants on pages 43-46 of their brief, which militates against our contention.

It would seem, however, to be unnecessary to enter upon an elaborate analysis of the decisions or to multiply the citation of authorities in support of the doctrines as laid down in the vast majority of cases bearing on the subject of the relation of a cropper to the owner of property which he cultivates, because of the virtual concession of appellants on pages 19-22 of their brief. There the distinction between a cropper and a lessee as laid down by the authorities on which we rely, is unqualifiedly recognized.

The Appellants' Argument Based on the Terms of the Contract.

(*1.*) An effort has been made by appellants to disregard the clear and express terms of the agreement and to contort it into the very converse of what that language declares and shows it to be. The facts, that it is an agreement for employment; that the owner is to furnish the tools, implements, supplies and horses with which Inouye is to do his work; that it is provided that the cropper shall have no interest or estate whatsoever in the land; that the latter is to receive his compensation from the owner for the labor and services rendered, in the form of a share of the crops; that the general possession of the land is reserved to the owner; that Inouye is to perform the duties specifically described, all of which represent labor and service performed by him—are swept to one side, or are dismissed with the statement that similar provisions might have been put into a lease, which, with respect to the substantial and controlling provisions, would have resulted in an incongruity. In their present setting all of the clauses are consistent and harmonious.

(*2.*) Thus, for illustration, let us refer to paragraph I (*Rec.* p. 8), wherein the cropper agrees "after the execution and delivery of the agreement and at the proper time to plant, cultivate and harvest the following specified crops: strawberries, raspberries, loganberries and vegetables, in a good and farmerlike manner." Appellants' counsel says that, by this provision, the cropper is given discretion as to any crops to be planted, and that no such discretion is given to the owner with the exception of the particular crops above specified.

This is a rather confusing statement. The cropper unqualifiedly agrees to plant, cultivate and harvest specified crops, to do it in a good and workmanlike manner, and at the proper time. There is not a word in this paragraph, or elsewhere, which gives the cropper any discretion as to what crops should be planted. He is expressly told by the owner exactly what crops he shall plant, cultivate and harvest, and how and when he shall do it. He is given no discretion whatsoever in any particular; whereas the owner, by the provisions of the contract, directs, in precise terms, what the cropper, as his employee, is obliged to do.

What has been said of paragraph I, is equally true of paragraphs J, K and L (*Rec.* p. 8).

(*3.*) Appellants, however, direct the weight of their criticism to paragraphs A and H (*Rec.* pp. 6, 7), upon which Judge Bledsoe likewise comments, although he recognizes the provision in paragraph E, which provides that the cropper shall have no interest or estate whatsoever in the land described in the contract, as being portentous and controlling, and as operating as an estoppel against any claim by Inouye that he had any right in the land (*Rec.*, p. 30).

Regardless of the conclusive answer thus made to the contention based on paragraphs A and H, and of the fact that the contract, read as a whole, eloquently answers the suggestion that it confers an interest in land, we will briefly advert to the two paragraphs particularized.

(*4.*) In paragraph A, the owner agrees to employ the cropper and not to interfere with him in the planting, cultivating and harvesting of the crop in any way, and to protect the cropper during the existence of the contract against interference by any person whatsoever, the paragraph ending with the clause: "the general possession of the land above described being reserved to owner" (*Rec.*, p. 6).

The meaning of this provision, in the light of the authorities, is clear. The cropper being a mere employee and the general possession of the land being reserved to the owner, the cropper has no right of action against a trespasser who seeks to interfere with him while engaged in his work. Nor could he maintain an action of trespass against his employer were he to prevent the cropper from planting, cultivating and harvesting the crop upon which the compensation which he is to receive for his labor depends.

It is well settled that a cropper may not maintain trespass or ejectment for a wrongful entry upon the premises on which he carries on his work. That was decided in the early case of *Bradish* v. *Schenck*, 8 Johns. 151, on the authority of *Hare* v. *Celey*, Cro. Eliz. 143, the Court saying:

> "Letting land upon shares, if for a single crop, is no lease of the land, and the owner alone must bring trespass for breaking the close."

In *Decker* v. *Decker*, 17 Hun, 14, 15, this subject was fully considered in the light of the authorities.

Of course, if the cropper cannot maintain an action against a trespasser who should seek to interfere with the doing of his work, especially where his compensation is based upon the results attained, then it is but natural that the owner of the property, who has the right to maintain an action for trespass, shall protect the cropper against interference. For the like reason an agreement on his part that he himself will not interfere with the cropper in the planting, cultivating and harvesting of the crop, is merely an assurance of what a court would imply without an express provision, that one employing another on a contingent basis is to do nothing to interfere with the performance by the employee of his contract and the earning of his compensation measured by the results of his labor.

Paragraph I, already considered, shows, however, that the nature of the planting, cultivating and harvesting which is to be carried on by the cropper is carefully prescribed by the owner.

(*5.*) Paragraph G (*Rec.*, p. 7) has also been adverted to as creating an interest in the land. Having stipulated in paragraph F to give the cropper fifty per cent of all crops grown on the land during the period of the agreement as compensation for his services and labor, the cropper is given the right to divide the crop after it is harvested and before its removal from the land. That is an option which the cropper may waive. If the cropper exercises the option he is given a reasonable time to remove his share of the crops thus given him within a reasonable time, even though it should extend beyond the terms of his employment. This is

merely an abundance of caution. It is believed that without such consent the cropper could not be a trespasser were he to remove his part of the crop after his employment had ended.

(*6.*) So far as paragraph H is concerned, the employer agrees that the cropper in carrying out his agreement may employ "such agents or employees as he shall see fit, and to give to such agents or employees free ingress or egress from said property, or the right to live thereon, without let or hindrance." (*Rec.*, p. 7.) This merely means that the cropper may, at his own expense, if he finds it desirable, employ others to help him in performing the work which he has to do, and that such employees are not to be prevented from having access to the property or from living upon the property in connection with the work which they are to perform. Certainly nobody can pretend that this provision gives to these agents or employees an interest in the land.

The situation would be precisely the same if O'Brien had been the owner of a clay bed and Inouye had been employed by him to make bricks out of the clay, his compensation to be paid by O'Brien in the form of a percentage of the price realized for the bricks, Inouye being permitted to employ such assistance as he desired under a clause precisely like that which we are now considering. Would anybody contend that this gave him an interest in the land, or that such a provision as paragraph H would in any way tend to create such an interest? Could a Japanese brickmaker be constitutionally deprived of the opportunity to earn his livelihood, by converting the clay-bank into bricks, even had this statute (which it has not) declared that his contract created an interest in land? If he could, then he might with equal right be prohibited, under pains

and penalties from working in a mine under a contract, because it would be an agreement in respect to land.

If the brickmaker and the miner would not and could not come within the purview of this statute, on what theory can the State prohibit a cultivator of land under a cropper contract, such as that now under discussion from working under such a contract?

In all these instances, the brickmaker, the miner and the cropper though working on the land and deriving compensation from their employment dependent on the productivity of their labor, have no "interest in the land," as such—in the sense in which that term has been always understood.

(7.) The two concluding provisions of the contract (*Rec.*, pp. 8, 9) are in every way consistent with a contract of employment. The owner, having agreed to employ the cropper for a period of four years, reserves the privilege of terminating the agreement in the event that he should sell the land on which the cropper is to plant, cultivate and harvest crops. A measure of compensation, in lieu of that specified in the previous part of the contract, is stipulated for in the event that the owner should exercise his option to terminate the agreement. The amount to be paid is expressly described as paid to the cropper "for his own services" for a specified period, "together with all moneys expended or incurred by said cropper for and on account of labor and materials furnished for the planting and cultivation of the crop or crops then growing on the land."

The clause with regard to the payment of damages by the owner to the cropper in the event that the former should commit a breach of the contract, is likewise consistent with a contract of em-

ployment, and has been inserted in the contract as fixing the measure of damages in such a case, a subject which has received consideration in many cases and especially in *Taylor* v. *Bradley*, 39 N. Y. 129, and which ordinary prudence would induce the parties to exclude from the domain of uncertainty and controversy.

II.

There is no merit in the suggestion of the appellants that the act under consideration in any manner effected a change in the principles controlling a cropper's contract and its legal effect so as to convert it into a lease and a transfer of an interest in land and thus make it the basis of a forfeiture and a criminal prosecution.

We do not acquiesce in the proposition, asserted on page 24 of the appellants' brief, that no one is entitled to acquire the title to land without the permission of the State. A general prohibition by the State of the right to sell or acquire the ownership of land, would deprive the owner or the intending purchaser of his liberty and property. Within certain limits, we may concede that the State may prohibit aliens, as a class, to acquire the title to real property. The limitations upon such prohibition are discussed in our brief in *Porterfield* v. *Webb*.

We contend, however, that the State cannot prohibit the owner of property from cultivating it by means of employees of his selection, irrespective of whether such employees are citizens

or aliens, and regardless of their racial stock. One would suppose that there could be no contention to the contrary since the decision in *Truax* v. *Raich, supra.*

The State has no such dominion over any property within its boundaries, whether it be used for agricultural or other purposes, as to limit the owner in the selection of the agencies by which he may desire to utilize his land or as to the method by which such agencies shall be paid, whether it shall be in money or in the product of the land, whether upon a daily or weekly wage basis, or whether the compensation shall be measured by a specified share or percentage of the product of the labor performed. No fancied distinction, based on the alienage of the employee, can interfere with that right of the owner of the property; nor can it interfere with the right of the alien employee to earn his livelihood by means of his labor in an honest employment, whether it be in a factory, a workshop, or in an agricultural pursuit.

The State of California cannot, as a sovereign, say to an owner of land within its jurisdiction, that he is required himself to cultivate his land, that he shall not permit an alien to cultivate it for him, or that he is required personally to act as the manager of the operations conducted upon his farm.

The State cannot even exclude aliens from its territory. That is exclusively within the jurisdiction of the Federal Government. It is conceded that the latter may so shape its immigration laws as to forbid the entry into the country of all aliens. So long as it has not done so, however, the State cannot, without violating the Federal Constitution, make it criminal for a farmer

to employ any alien whatsoever, who has been lawfully admitted into the United States, or for any alien, so admitted, to enter into the employ of a farmer under a contract such as that which O'Brien and Inouye have negotiated in the case at bar and which they are desirous of performing.

Appellants are forced to concede that the farmer may employ "an ineligible alien" to work for him, and yet that concession is coupled with the condition that he may not work for him under a cropping contract of a character which has been recognized not only as valid, but commendable, in most of the States of the Union, and which, up to the present time, has never been questioned anywhere. If the State of California had regarded such a contract as an evil, it would have been a very simple matter to have used appropriate language in the statute to forbid a land owner or an alien from entering into such a contract. But it refrained from doing so.

A failure to express what it would have been easy to say, is significant and frequently decisive.

U. S. v. *Chase,* 135 U. S. 259.
National Bank v. *Matthews,* 98 U. S. 627.
Tompkins v. *Fort Smith Railway Co.,* 125 U. S. 127.
Tillson v. *U. S.,* 100 U. S. 46.
Baltimore R. R. Co. v. *Grant,* 98 U. S. 403.
U. S. v. *Detroit First Natl. Bank,* 234 U. S. 262.

The fact that the authorities are at one in declaring that such an agreement as that in the

case at bar is one of employment and does not confer an interest in land, shows beyond a doubt that there is nothing in this statute which amounts to an exercise by the State of that dominion which appellants are seeking to ascribe to it. It would certainly put the State in a most unenviable light, however, if it permitted cropping contracts like the present between citizens or between a citizen and an alien German, Russian, Hungarian, Bulgarian, Italian, Spaniard, Parsee or Syrian, and forbade such a contract between a citizen and a subject of Japan.

The criticism made of Orientals who cultivate farms is not that they are incompetent, that they prevent the land from being productive, that their methods of tilling the soil are inadequate or wasteful, that they are indolent or careless or negligent, but, on the contrary, that they are too industrious, too intensive and too efficient, and that they have increased the productivity of the land on which they are employed.

Until the State of California, in a statute couched in clear and unambiguous language, has declared that a citizen-owner of agricultural lands and a Japanese admitted to the United States are to be penalized for entering into such a cropping contract as that which we have before us, it is not to be presumed that it intended, by the act of 1920, to accomplish a result so startling in its consequences. Even a sovereign state when it lays down a new policy, or seeks to create a new crime must say what it means, in unmistakable language.

III.

It is respectfully submitted that the order of the District Court should be affirmed.

LOUIS MARSHALL,
Counsel for Appellees.

WEBB, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, ET AL. *v.* O'BRIEN ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 26. Argued April 23, 24, 1923.—Decided November 19, 1923.

1. A citizen can have no legal right to enter into a contract involving land with an alien who cannot legally make and carry out the contract. P. 321.
2. In the absence of a treaty to the contrary, a State has power to deny aliens the right to own land within its borders. P. 322.
3. A cropping contract between an owner of land in California and a Japanese alien, which, though it may not amount to a lease or a transfer of an interest in real property, is more than a contract of employment in that it gives the alien a right to use, and have a share in the benefit of, the land for agricultural purposes, exceeds the privileges granted to such aliens by Art. I of the treaty of February 21, 1911, 37 Stat. 1504, between the United States and Japan, and is forbidden by the California Alien Land Law, which denies to aliens ineligible to citizenship permission to have or enjoy any privilege, not prescribed in the treaty, in respect to the use or the benefit of land for agricultural purposes. P. 322.
4. In forbidding such contracts, the state law violates no right of the landowner or the alien under the Federal Constitution. P. 324. See *Terrace* v. *Thompson*, *ante*, 197; *Porterfield* v. *Webb*, *ante*, 225. *Truax* v. *Raich*, 239 U. S. 33, distinguished.

279 Fed. 117, reversed.

APPEAL from a decree of the District Court granting an interlocutory injunction, in a suit to enjoin state officials from instituting proceedings to enforce the California Alien Land Law.

Mr. U. S. Webb, Attorney General of the State of California, with whom *Mr. Frank English*, Deputy Attorney General, and *Mr. C. C. Coolidge* were on the brief, for appellants.

I. The law of landlord and tenant, and the distinction drawn by the courts between the title of a lessee and the

mere right to compensation of a cropper, have developed in consideration of the mutual rights of the parties to these agreements and the rights of third parties other than the State.

II. The State of California is not concerned with the rights that the law of real property may or may not give to such a cropper to assign the growing crop. The State is interested in preventing such a cropper, if he be an alien ineligible to citizenship, actually enjoying the possession and dominion of the land.

Here we should have practical dominion of the soil by this particular ineligible alien. His interests would demand that he cultivate the soil according to his own theories and impose thereon such living environments as would be most conducive to his own advantage, just as he would if he owned the land.

The influence, standard of living, agricultural ideas and economic theories of this alien would prevail. The knowledge of husbandry gained from this experience would redound to the benefit of this alien. In the case of regular "employment," the theories of the owner of the land would prevail and such an owner would be the gainer by reason of this experience.

One important reason for the rule that we find in some States, that a cropper has no interest in the land, is to protect the owner of the land from the results that would follow, as a matter of law, if the arrangement were considered a lease, and complete title to the crop thus vested in the cropper as a lessee up to the time of the division of the crop. *Guest* v. *Opdyke*, 31 N. J. L. 552; *Caswell* v. *Districh*, 15 Wend. 379.

Other cases hold against the theory of a lease, so as to vest sufficient title to the crop in the owner of the land, to permit of the owner joining as a plaintiff in actions brought to protect the crop. None of the results that should be avoided need happen in California if in this

case it is determined that the cropper has such an interest in the land as to violate the California Alien Land Act. See *Johnson* v. *Hoffman*, 53 Mo. 504.

III. The rule established by the California Supreme Court, on cropping contracts, is that the landowner and the cropper may be tenants in common of the crop and at the same time the cropper may have an interest in the land. This is a different rule than that which exists in some other jurisdictions. *Bernal* v. *Hovious*, 17 Cal. 541; *Walls* v. *Preston*, 25 Cal. 60; *Knox* v. *Marshall*, 19 Cal. 617; *Smith* v. *Schultz*, 89 Cal. 526; and see *Moulton* v. *Robinson*, 27 N. H. 550; *Warner* v. *Abbey*, 112 Mass. 355; *Ferris* v. *Hoglan*, 121 Ala. 240; *Dixon* v. *Niccolls*, 39 Ill. 372; *McNeal* v. *Rider*, 79 Minn. 153; *Strangeway* v. *Eisenman*, 68 Minn. 395.

Mr. Louis Marshall for appellees.

I. The cropping contract, the execution of which the appellants contend would subject the parties to punishment by imprisonment or fine, or both, and would immediately result in an escheat of the land to which it relates to the State of California, does not come within the terms of the act, because it does not effect a transfer of real property or of an interest therein.

This statute does not undertake to prohibit any aliens from entering into a contract for the performance of labor upon agricultural lands within the State of California. Had it attempted to do so, the effort would have been nugatory, because it would clearly offend against the provision of the Fourteenth Amendment which guarantees them against deprivation of their liberty and property without due process of law. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Truax* v. *Raich*, 239 U. S. 33; *Whitfield* v. *Hanges*, 222 Fed. 745; § 1977, U. S. Rev. Stats.

In order to give the statute of 1920 any constitutional effect whatever (which we have contended, in the *Porter-*

field Case, [*ante,* 225,] cannot be done,) it must relate to the acquisition of the title of real property or of an interest therein. That is the only reasonable significance that can attach to the language of §§ 1, 2, and 3, and is emphasized by other parts of the act.

The contract here does not constitute a transfer of real property. It is in its essence a contract of employment. It contains not a single word or phrase essential to the creation of a lease. It does not convey or transfer any land to Inouye; it does not provide for the payment by him of any rent. It does not give to him the general possession of the land, but, on the contrary, the general possession is reserved to O'Brien, the owner. It does not confer upon him the ownership of the crops growing on the land. It does not even provide that he shall give to the owner any part of the crops produced. On the contrary, O'Brien, the owner, is to compensate Inouye for his labor and services, by giving to him one-half of the crops grown on the land, and in order to avoid any possibility of a misinterpretation the instrument merely permits Inouye to work the land and provides that he shall have no interest or estate whatsoever in it. There is not a word which would justify an inference that the contract was anything else than a contract for personal services rendered by Inouye. Nor does it by its terms inure to or bind his personal representatives or assigns. From the beginning to the end of the document the relation between the parties as that of employer and employee is meticulously maintained.

To sustain the appellants' contention would involve the escheat of O'Brien's property—a forfeiture—and the imprisonment or fine, or both fine and imprisonment, of both O'Brien and Inouye, under the penal provisions of the act. The law abhors a forfeiture.

Statutes in derogation of common-law rights, *Meister* v. *Moore,* 96 U. S. 79; *Shaw* v. *Railroad Co.,* 101 U. S.

565; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Thompson* v. *Thompson*, 218 U. S. 618; and all statutes of a penal nature, whether civil or criminal, must be construed strictly in favor of those whom they affect, irrespective of whether the penalty is forfeiture of property, fine, or imprisonment.

If the acts alleged do not come clearly within the prohibition of the statute, its scope will not be extended to include other offenses than those which are clearly prescribed and provided for; and if there is a fair doubt as to whether the act charged is embraced in the prohibition, that doubt is to be resolved in favor of the defendant.

Whatever differences may have existed at an earlier period as to the effect of cropping contracts, the law is now well settled, and unless the provisions of the agreement clearly indicate an intent to create a leasehold or to confer an interest in land on which the work is to be done, the relation between the owner of the property and the person cultivating the land is regarded as that of employer and employee. 1 Washburn, Real Property, 5th ed., p. 604; 2 Reeves, Real Property, § 564; Jones, Landlord and Tenant, § 49; Warvelle, Ejectment, § 26; McAdam, Landlord and Tenant, 4th ed., § 45; 17 Corpus Juris, p. 382; *Caswell* v. *Districh*, 15 Wend. 378; *Putnam* v. *Wise*, 1 Hill, 234; *Bernal* v. *Hovious*, 17 Cal. 541; *Walls* v. *Preston*, 25 Cal. 59; *Clarke* v. *Cobb*, 121 Cal. 595; *Taylor* v. *Bradley*, 39 N. Y. 129; *Unglish* v. *Marvin*, 128 N. Y. 380; *Reynolds* v. *Reynolds*, 48 Hun, 142; *Vaughn* v. *DeWandler*, 63 How. Pr. 380; *Booher* v. *Stewart*, 75 Hun, 214; *Estate of Ellis*, 78 Misc. 589; *Stall* v. *Wilbur*, 77 N. Y. 158; *Sexton* v. *Breese*, 135 N. Y. 391; *Crosby* v. *Woleben*, 149 App. Div. 338; *Wiggins Ferry Co.* v. *Ohio & Mississippi Ry. Co.*, 142 U. S. 396; *Taylor* v. *Donahoe*, 125 Wis. 513; *Guest* v. *Opdyke*, 31 N. J. L. 552; *State* v. *Jewell*, 34 N. J. L. 259; *State* v. *Reynolds*, 67 N. J. L. 169; and many other cases. Distinguishing, *Smith* v. *Schultz*,

89 Cal. 526; *Dixon* v. *Niccolls*, 39 Ill. 372; *Ferris* v. *Hoglan*, 121 Ala. 240; *Strangeway* v. *Eisenman*, 68 Minn. 395; and *McNeal* v. *Rider*, 79 Minn. 153.

It is well settled that a cropper may not maintain trespass or ejectment for a wrongful entry upon the premises on which he carries on his work. *Bradish* v. *Schenck* 8 Johns. 151; *Hare* v. *Celey*, Cro. Eliz. 143; *Decker* v. *Decker*, 17 Hun, 14; *Taylor* v. *Bradley*, 39 N. Y. 12.

II. There is no merit in the suggestion that the act under consideration in any manner effected a change in the principles controlling a cropper's contract and its legal effect, so as to convert it into a lease and a transfer of an interest in land, and thus make it the basis of a forfeiture and a criminal prosecution.

If the State of California had regarded such a contract as an evil, it would have been a very simple matter to have used appropriate language in the statute to forbid a landowner or an alien from entering into such a contract.

A failure to express what it would have been easy to say is significant and frequently decisive. *United States* v. *Chase*, 135 U. S. 259; *National Bank* v. *Matthews*, 98 U. S. 627; *Tompkins* v. *Fort Smith Ry.*, 125 U. S. 127; *Tillson* v. *United States*, 100 U. S. 46; *Railroad Co.* v. *Grant*, 98 U. S. 403; *United States* v. *First Natl. Bank*, 234 U. S. 262.

The fact that the authorities are at one in declaring that such an agreement as that in the case at bar is one of employment, and does not confer an interest in land, shows beyond a doubt that there is nothing in this statute which amounts to an exercise by the State of that dominion which appellants are seeking to ascribe to it.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is a suit brought by the appellees to enjoin the Attorney General of California and the District Attorney

of Santa Clara County from instituting any proceedings to enforce the California Alien Land Law[1] against them.

O'Brien is a citizen and resident of California, and owns ten acres of agricultural land in the county of Santa Clara.

[1] Initiative Measure adopted November 2, 1920. Statutes 1921, p. lxxxiii.

Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit, and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

Section 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

Section 3 provides that any company, association or corporation a majority of whose members are ineligible aliens or in which a majority of the issued capital stock is owned by such aliens is permitted to acquire, possess, enjoy and convey real property or any interest therein, in the manner and to the extent and for the purposes prescribed by any treaty, etc. Hereafter, ineligible aliens may become members of or acquire shares of stock in any company, association or corporation that is or may be authorized to acquire, possess, enjoy or convey agricultural land, in the manner and to the extent and for the purposes prescribed by any treaty . . . and not otherwise.

Section 4 provides that no ineligible alien and no company, association or corporation mentioned in § 3 may be appointed guardian of that portion of the estate of a minor which consists of property which such alien or such company, association or corporation is inhibited from acquiring, possessing, enjoying or transferring by reason of the provisions of the act. The superior court may remove the guardian of such an estate whenever it appears to the satisfaction of the court that facts exist which would make the guardian ineligible to appointment in the first instance.

Section 5(a). The term "trustee" as used in this section means any person, company, association or corporation that as guardian, trustee, attorney-in-fact or agent, or in any other capacity has the title, custody or control of property, or some interest therein, belonging to an ineligible alien or to the minor child of such an alien, if the

Inouye is a capable farmer, and is a Japanese subject living in California. O'Brien and Inouye desire to enter into a cropping contract covering the planting, cultivating

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property is of such a character that such alien is inhibited from acquiring, possessing, enjoying or transferring it.

(b). Annually every such trustee must file a verified written report showing: . . . (3) An itemized account of all expenditures, investments, rents, issues and profits in respect to the administration and control of such property with particular reference to holdings of corporate stock and leases, cropping contracts and other agreements in respect to land and the handling or sale of products thereof is required of such trustee.

Section 6 provides for sale and distribution of proceeds when, by reason of the provisions of the act, any heir cannot take real property or membership or shares of stock in a company, association or corporation.

Section 7 provides for the escheat of property acquired in fee by any ineligible alien and that no alien, company, association or corporation mentioned in § 2 or § 3 hereof shall hold for a longer period than two years, the possession of any agricultural land acquired in the enforcement of or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure a debt.

Section 8. Any leasehold or other interest in real property less than a fee, hereafter acquired in violation of the provisions of this act by any ineligible alien or by any company, association or corporation mentioned in section 3 of this act, shall escheat to the State of California. . . . Any share of stock or interest of any member in a company, association or corporation hereafter acquired in violation of the provisions of section 3 of this act shall escheat to the State of California.

Section 9. Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state if the property interest involved is of such a character that an ineligible alien is inhibited from acquiring, possessing, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein.

Section 10. If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both.

and harvesting of crops to be grown on the land. They allege that the execution of such a contract is necessary in order that the owner may receive the largest return from the land, and that the alien may receive compensation therefrom; that the Attorney General and District Attorney have threatened to and will enforce the act against them if they execute the contract, and will forfeit or attempt to forfeit the land by an escheat proceeding, and will prosecute them criminally for violating the act. They aver that the act is so drastic, and the penalties for its violation are so great, that neither of them may execute the contract even for the purpose of testing its validity and its application thereto; and that, unless the court shall determine the validity of the act and its application, they will be compelled to submit to it, whether valid or invalid, and to the appellants' interpretation of it, and so be deprived of their property without due process of law and denied the equal protection of the laws in contravention of the Fourteenth Amendment.

Appellees applied for an interlocutory injunction. The matter was heard by three judges, as provided in § 266 of the Judicial Code. The injunction was granted, and the Attorney General and District Attorney appealed.

O'Brien, who is a citizen, has no legal right to enter into the proposed contract with Inouye, who is an ineligible Japanese alien, unless the latter is permitted by law to make and carry out such a contract. At common law, aliens, though not permitted to take land by operation of law, may take by the act of the parties; but they have no capacity to hold against the State, and the land so taken may be escheated to the State. See *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch, 603, 609, 619, 620; *Governeur's Heirs* v. *Robertson*, 11 Wheat. 332, 355; *Phillips* v. *Moore*, 100 U. S. 208, 212; *Atlantic & Pacific R. R. Co.* v. *Mingus*, 165 U. S. 413, 431. In the absence of

a treaty to the contrary, the State has power to deny to aliens the right to own land within its borders. *Terrace* v. *Thompson, ante,* 197; *Hauenstein* v. *Lynham,* 100 U. S. 483, 484, 488; *Blythe* v. *Hinckley,* 127 Cal. 431, affirmed 180 U. S. 333, 340; *Ex parte Okahara,* 216 Pac. 614. The provision of the act which limits the privilege of ineligible aliens to acquire real property or any interest therein to that prescribed by treaty is not in conflict with the Fourteenth Amendment. *Terrace* v. *Thompson, supra; Porterfield* v. *Webb, ante,* 225; *Ex parte Okahara, supra.* The treaty between the United States and Japan (37 Stat. 1504–1509) does not confer upon the citizens or subjects of either in the territories of the other the right to acquire, possess or enjoy lands for agricultural purposes. *Terrace* v. *Thompson, supra; Ex parte Okahara, supra.*

By the proposed cropping contract, Inouye is given the right for a term of four years to plant, cultivate and harvest crops—berries and vegetables—on the land, and to be free from interference by the owner, who undertakes to protect him during the term against interference by any other person. He is entitled to housing for himself, and is granted the right to employ others to work on the land, and to give to them free ingress and egress and the right to live on the land. He is entitled to one-half of all crops grown on the land during the term, to be divided after they are harvested and before removal from the land, and is given a reasonable time after the expiration of the term to remove his share of the crops. He is required to accept his share of the crops as reimbursement for expenditures made to carry on the farming operations, and as his only return from the undertaking. Assuming that the proposed arrangement does not amount to a leasing or to a transfer of an interest in real property, and that it includes the elements of a contract of employment (*Ex parte Okahara, supra*), we are of opinion that it is more than a contract of employment; and that, if executed, it will give to

Inouye a right to use and to have or share in the benefit of the land for agricultural purposes. And this is so, notwithstanding other clauses of the contract to the effect that the general possession of the land is reserved to the owner, that the cropper shall have no interest or estate whatever in the land, that he is given one-half of all crops grown as compensation for his services and labor, and that division of the crops is to be made after they are harvested and before their removal from the land.

The treaty grants liberty to own or lease and occupy houses, manufactories, warehouses and shops, and to lease land for residential and commercial purposes.[2] Section 2 of the act extends the privilege to acquire, possess, enjoy and transfer real property or any interest therein only in the manner and to the extent and for the purposes prescribed in the treaty. The treaty gives no permission to enjoy, use or have the benefit of land for agricultural purposes. The privileges granted by the act are carefully limited to those prescribed in the treaty. The act as a whole evidences legislative intention that ineligible aliens shall not be permitted to have or enjoy any privilege in respect of the use or the benefit of land for agricultural purposes. And this view is supported by the circumstances and negotiations leading up to the making of the treaty. See *Terrace* v. *Thompson, supra; Same* v. *Same,* 274 Fed. 841, 844, 845. As applied to this case, the act may be read thus: "Ineligible aliens may own or lease houses, manufactories, warehouses and shops, and may lease land for residential and commercial purposes. These

[2]Article I. The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

things, but no possession or enjoyment of land otherwise, are permitted."

The term of the proposed contract, the measure of control and dominion over the land which is necessarily involved in the performance of such a contract, the cropper's right to have housing for himself and to have his employees live on the land, and his obligation to accept one-half the crops as his only return for tilling the land clearly distinguish the arrangement from one of mere employment. The case differs from *Truax* v. *Raich*, 239 U. S. 33. In that case, a statute of Arizona making it a criminal offense for an employer of more than five workers, regardless of kind or class of work or sex of workers, to employ less than eighty per cent. native born citizens of the United States was held to infringe the right, secured by the Fourteenth Amendment, of a resident alien to work in a common occupation—cooking in a restaurant. The right to make and carry out cropper contracts such as that before us is not safeguarded to ineligible aliens by the Constitution. A denial of it does not deny the ordinary means of earning a livelihood or the right to work for a living. The practical result of such contract is that the cropper has use, control and benefit of land for agricultural purposes substantially similar to that granted to a lessee. Conceivably, by the use of such contracts, the population living on and cultivating the farmlands might come to be made up largely of ineligible aliens. The allegiance of the farmers to the State directly affects its strength and safety. *Terrace* v. *Thompson, supra.* We think it within the power of the State to deny to ineligible aliens the privilege so to use agricultural lands within its borders.

The decision of the Supreme Court of California in *Ex parte Okahara, supra*, a *habeas corpus* case, does not support the appellees' contention. In that case an ineligible Japanese was held on a warrant charging him with conspiracy to effect a transfer of real property in violation

of § 10 of the Alien Land Law. The gravamen of the offense charged was that Okahara, in furtherance of the conspiracy, executed a contract with another, whereby the latter transferred to him for a term of five years an interest in 20 acres of agricultural land. The only question before the court in that case was whether the contract amounted to a transfer of real property or of an interest therein in violation of § 10. The court said: ". . . the instrument before us cannot be characterized as a lease or transfer of any interest in real property because it lacks many of the essential elements of a lease, while on the other hand it bears all the characteristics of an agreement of hiring. But if it cannot be said to be an agreement of employment pure and simple, it cannot under any rule of construction be held to be more than a cropping contract." After referring to the terms of the contract and reviewing authorities, it said: "The argument that the law forbids the making of a contract of employment or agreement to till the soil on shares can only be sustained by adopting the theory that the particular agreement under consideration transfers an interest in land." The court held that the contract did not violate § 10 and discharged Okahara. The contract in that case differs in important particulars from the one before us; but in the view we take of this case, we need not determine whether, within the meaning of the act, the contract between O'Brien and Inouye, if executed, would effect a transfer of an interest in real property. The question in this case is not whether the proposed contract is prohibited by § 10, but it is whether appellees have shown that they have a right under the Constitution or treaty to make and carry out the contract, and are entitled to an interlocutory injunction against the officers of the State. A negative answer must be given.

The privilege to make and carry out the proposed cropping contract, or to have the right to the possession, en-

joyment and benefit of land for agricultural purposes as contemplated and provided for therein, is not given to Japanese subjects by the treaty. The act denies the privilege because not given by the treaty. No constitutional right of the alien is infringed. It therefore follows that the injunction should have been denied.

The order appealed from is reversed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS think there is no justiciable question involved and that the case should have been dismissed on that ground.

MR. JUSTICE SUTHERLAND took no part in the consideration or decision of this case.

FRICK ET AL. v. WEBB, ATTORNEY GENERAL OF